TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 13

WILLIAM H. BLACK AND RUTH F. BLACK,
PETITIONERS,

vs.

A. M. AMEN, H. C. WADLEIGH, ELLEN WADLEIGH,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES [redacted] COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1956

CERTIORARI GRANTED NOVEMBER 5, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

Pleas and proceedings before the Honorable Arthur J. Mellott, Chief Judge and the Honorable Delmas C. Hill, Judge, of the United States District Court for the District of Kansas, presiding in the following entitled causes:

A. M. AMEN, Plaintiff,

v.

BLACK-MARSHALL OIL COMPANY, a corporation, NATIONAL COOPERATIVE REFINERY ASSOCIATION, a corporation, LANDOWNERS OIL ASSOCIATION, a corporation, WILLIAM H. BLACK, DALE G. IVES, LEON F. HUFF, ARTHUR W. KINCADE, O. A. BEECH, J. R. SHERRARD, SPENCER I. BERGLUND, Defendants,

No. 3495—Civil

A. M. AMEN, H. C. WADLEIGH, T. N. DANFORD, L. E. ROBINSON, HAYS HALL and H. W. RILEY, Plaintiffs,

v.

BLACK-MARSHALL OIL COMPANY, a corporation, NATIONAL COOPERATIVE REFINERY, ASSOCIATION, a corporation, LANDOWNERS OIL ASSOCIATION, a corporation, WILLIAM H. BLACK, DALE G. IVES, LEON F. HUFF, ARTHUR W. KINCADE, O. A. BEECH, J. R. SHERRARD, SPENCER I. BERGLUND, CECIL C. ANDERSON, GLADYS M. ANDERSON, LOTTIE H. ANDERSON, WALTER H. BEECH, RUTH F. BLACK, WILLIAM F. BLACK, HOWARD S. BRYANT, FAYETTE B. DOW, WALTER C. ENGLISH, FRANK FRITTS, MARY G. FRITTS, JAS. H. GRAHAM, EDITH HAHN, JESSE S. MONTGOMERY, RUTH KELLOGG ORR, H. O. PEET & COMPANY, a corporation, EDWARD ROOS, SMITH, [fol. 2] et al., Trustees for Joan Birnie Hamill, SMITH, et al., Trustees for Elizabeth Byron Smith, SMITH, et al., Trustees for Harold Byron Smith, SMITH, et al., Trustees for Anne Byron Waud, and SMITH et al., Trustees for Emily Birnie Smith, Defendants.

No. 3509—Civil

D. ARTHUR WALKER, and FRED E. WINDISH, Co-receivers of Black-Marshall Oil Company, a corporation, Plaintiffs;

v.

WILLIAM H. BLACK and RUTH F. BLACK, Defendants.

No. W-143—Civil

A. M. Amen, Plaintiff v. Black-Marshall Oil Company, a corporation, National Cooperative Refinery Association, a corporation, Landowners Oil Association, a corporation, William H. Black, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, O. A. Beech, J. R. Sherrard, Spencer I. Berglund, Defendants, No. 3495.

COMPLAINT (No. 3495) Filed June 28, 1949

A. M. Amen, plaintiff herein, brings this complaint on behalf of himself and all other shareholders of Black-Marshall Oil Company who are similarly situated, all said shareholders being sometimes hereinafter referred to collectively as plaintiffs, against Black-Marshall Oil Company, a corporation (hereinafter sometimes referred to as the Company), Landowners Oil Association, a corporation, National Cooperative Refinery Association, a corporation (hereinafter sometimes referred to as the Association), William H. Black, president, director and shareholder of the Company, Dale G. Ives, secretary-treasurer, director and shareholder of the Company, Leon F. Huff, assistant secretary-treasurer, director and shareholder of the Company, Arthur W. Kincade, director and shareholder of the Company, O. A. Beech, director and shareholder of the Com-[fol. 3] pany, J. R. Sherrard, director and shareholder of the Company, and Spencer I. Berglund, director and shareholder of the Company, and respectfully represents as follows:

1. Plaintiff A. M. Amen is a citizen of the State of South Dakota and resides in the City of Yankton in said State.

2. Defendant Black-Marshall Oil Company is a corporation organized under the laws of the State of Illinois and is a citizen of said State. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware, and is authorized to do business, and is doing business, in the State of Kansas, and said defendant's principal place of business in Kansas is in Great Bend, Kansas. Defendant National Cooperative Refinery Association is a corporation organized under the laws of the State of Kansas and is a citizen of said State. Defendant William H. Black is a citizen of the State of California and resides in the City of La Jolla in said State. Defendant Dale G. Ives is a citizen of the State of Illinois and resides in the City of Aledo in said State. Defendant Leon F. Huff is a citizen of the State of Kansas and resides in the City of Great Bend in said State. Defendant Arthur W. Kincade is a citizen of the State of Kansas and resides in the City of Wichita in said State. Defendant O. A. Beech is a citizen of the State of Kansas and resides in the City of Wichita in said State. Defendant J. R. Sherrard is a citizen of the State of Illinois and resides in the City of Aledo in said State. Defendant Spencer I. Berglund is a citizen of the State of Florida and resides in the City of Sarasota in said State.

3. This action is a suit of a civil nature in equity between citizens of different States, namely, the plaintiff and the defendants, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00).

4. Black-Marshall Oil Company was incorporated in 1940. At the time of each and all of the transactions of which he complains here n, plaintiff was a shareholder of the Company.

5. At some time prior to July 1, 1947, the exact date [fol. 4] being unknown to plaintiff, the defendants fraudulently, inequitably and unlawfully purported to sell and transfer title of a majority of the stock and a large portion of the assets, the equitable ownership of a substantial portion of such stock and assets being in the plaintiffs, to the Association, for and in consideration of the payment

by the Association of certain sums of monies hereinafter referred to as the alleged purchase price.

6. At some time or times within the period stated in paragraph 5 above, the defendants fraudulently, unlawfully and inequitably entered into a conspiracy and joint venture for the purpose of depriving the plaintiffs of their legal and equitable ownership of, and respective rights to, their proper distributive share of the amount of the said alleged purchase price, and of certain other property hereinafter mentioned in paragraph 14 hereof, and pursuant to said conspiracy and joint venture said defendants purported to deprive the plaintiffs of their lawful and equitable interest in and right to said property, and converted same to the defendants' own uses, and have ever since purported to deprive the plaintiffs of their interest in and rights to said alleged purchase price and said other property.

7. At some time or times within the period stated in paragraph 5 above, the defendants fraudulently, unlawfully and inequitably entered into a conspiracy and joint venture for the purpose of depriving the plaintiffs of their respective lawful and equitable interests and shares in the stock and assets of said Company and of the full and true value thereof, and pursuant to said conspiracy and joint venture, the defendants purported to deprive the plaintiffs of their said interests and shares in the stock and assets of said Company and of the full and true value thereof, and converted same to the defendants' own uses and have continued to do so.

8. Pursuant to and as a part of each of the conspiracies and joint ventures hereinbefore alleged:

(a) Defendants during 1944, or earlier, without disclosure to or knowledge on the part of plaintiffs, arranged, undertook and agreed that there be fraudulently and unlawfully obtained and transferred to the Association a majority of the stock and a large portion of the assets of the Company;

[fol. 5] (b) With monies furnished by the Association for such purposes, and with the full knowledge and assistance of the Association, the defendants accordingly arranged to purchase the shares of stock in the Company owned by the

plaintiffs at prices, and on the basis of payments, to the plaintiffs, substantially less, and known by the defendants to be substantially less, than (1) plaintiffs' respective proportionate shares and interests in the alleged purchase price paid, or to be paid, by the Association, and of certain other property hereinafter mentioned in paragraph 14 hereof, and (2) substantially less, and known by defendants to be substantially less, than the full and true value of said shares and of said other property hereinafter mentioned in paragraph 14 hereof;

(c) Defendants undertook to acquire the said shares of stock from the plaintiffs so that, among other things, such shares of stock would be no longer outstanding, the consent of the plaintiffs to the transfer of assets of the Company or to a dissolution of the Company would not be required, and the remaining shareholders would personally profit to a greater extent than would have been the case if the alleged purchase price had been prorated among all of the shareholders of the Company, including the plaintiffs;

(d) Defendants falsely, fraudulently and unlawfully represented to the plaintiffs that a sale of a certain large portion of the assets of the Company had been arranged for an amount of which the proportionate share of each of the Company's shareholders would be approximately eleven dollars ($11.00) per share, and that plaintiffs should immediately endorse their respective certificates in blank, deliver them to defendants, and receive therefor approximately eleven dollars ($11.00) per share;

(e) Defendants falsely represented to plaintiffs that the Company's interest in defendant Landowners Oil Association, a Delaware corporation, and certain undeveloped leases and other properties which were not included among the assets in the aforesaid sale would be retained for the benefit of plaintiffs.

9. Plaintiffs having been induced by and acting in complete reliance upon said false and fraudulent representa-
[fol. 6] tions thus made, and unaware of their false and fraudulent nature, and of the conspiracies and joint ventures under and pursuant to which defendants were acting, did at various times during the years 1944 and 1945 en-

dorse in blank and deliver unto the defendants certificates representing their respective shares of the Company, receiving therefor approximately eleven dollars ($11.00) per share; the plaintiffs were fraudulently induced to part with legal title to their said respective shares to or for the benefit of the defendants; in each and all of the aforesaid instances, corporate funds of the Company were used to make the said purchases and said funds were advanced and furnished by the Association for such purposes; and, on information and belief said shares so obtained from the plaintiffs were either held in the treasury of the Company or held by one or more of the defendant officers and directors of the Company for and on behalf of the defendants, and pursuant to said conspiracies and joint ventures.

10. On information and belief said purported purchases by the Company were in violation of the Business Corporation Act of the State of Illinois, under which the Company was incorporated and existing; the Company did not have net assets available therefor, which the defendants well knew.

11. At the time the aforesaid purported purchases were made by the defendants they knew that the representations made by them in effectuating said purported purchases were false, and that the defendants' plans, purposes, and arrangements then in progress were for the sale and transfer of the said majority of the stock and a large portion of the assets of the Company to the Association for amounts which would produce pro rata distributions to shareholders substantially in excess of the amounts paid plaintiffs, and knew also that the value of said shares of stock was substantially in excess of the prices paid therefor to the plaintiffs.

12. The defendants consummated their said conspiracies and joint ventures, in part, by a purported sale and transfer of the said stock and assets of the Company to the Association for a price which, prorated among certain favored shareholders of the Company, not including any of the plaintiffs, resulted in a distributive proportion per [fol. 7] share substantially in excess of any of the prices

paid as aforesaid by the defendants in purporting to purchase the shares of the plaintiffs. The plaintiffs did not know until May, 1949, of the fraudulent acts, conspiracies and joint ventures of defendants as alleged in this complaint, and subsequently learned thereof by investigation.

13. Having consummated the conspiracies and joint ventures, in part, as aforesaid by the purported sale and transfer of the said shares of stock and a large portion of the assets of the Company to the Association, the defendants then proceeded illegally to attempt and pretend to dissolve the Company. Purported Articles of Dissolution for the Company entitled "Articles of Dissolution pursuant to Section 80 of 'The Business Corporation Act,'" were filed in the Office of the Secretary of State of Illinois on June 30, 1947. Said Articles of Dissolution were signed, purportedly on behalf of the Company, by the defendant William H. Black as its President and attested by the defendant Dale G. Ives as its Secretary, and said Articles of Dissolution falsely and fraudulently stated that, all debts, obligations and liabilities of the Company having been paid and discharged or adequately provided for, "All the remaining property and assets of the corporation [i.e., the Company] have been distributed among its shareholders, in accordance with their respective rights and interests."

14. At all the times herein mentioned the defendant Company legally or equitably owned the entire capital stock of defendant Landowners Oil Association, and other properties not included in the aforesaid transfer of properties to the National Cooperative Refinery Association. The said shares of stock of defendant Landowners Oil Association and the other said properties referred to in this paragraph were not withheld or disposed of for the benefit of the plaintiffs, as it was represented by defendants to the plaintiffs that they would be, but the plaintiff avers on information and belief that said shares and properties were, as a part of said conspiracies and joint ventures, transferred by the Company for a grossly inadequate consideration, and in fraud of the plaintiffs, to defendant William H. Black, and that said shares and properties are now wrong-

fully held by the said defendant William H. Black, and in trust for plaintiffs.

[fol. 8] 15. At all times mentioned herein the defendant officers and directors of the Company were owners of a majority of the shares of stock of the Company and dominated and controlled the Company, and the plaintiff accordingly has not demanded that the Company or said officers or directors bring this action against the defendants because said demand would be futile.

16. This action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

17. Because of said conspiracies and joint ventures, as set forth herein, the purported sale and the transfer of all the shares and properties referred to in this complaint are voidable; plaintiffs are the equitable owners of such shares and properties, as their interests therein may appear, and the defendants hold all of the said shares and properties, as their interests therein may appear, and the defendants hold all of the said shares and properties wrongfully transferred to them as aforesaid in trust for the plaintiffs.

18. As a result of the conspiracies and joint ventures herein set forth, the defendant shareholders and other favored shareholders of the Company received in the form of liquidating dividends from the Company, or otherwise, amounts greatly in excess of their respective distributive rights and interests, and plaintiffs are the equitable owners, as their interests may appear, of such excess payments to said persons, and each and all of said persons are indebted to plaintiffs for said excess amounts and hold the same in trust for plaintiffs.

19. On information and belief, the conspiracies, joint ventures, and unlawful acts of the defendants set forth herein violated the Federal Securities Act of 1933, May 27, 1933, 48 Stat. 74, as amended; Section 64 of the Federal Farm Credit Act of 1933, 48 Stat. 51, 267, as amended; Section 215 of the Federal Criminal Code proscribing the use of the mails for fraudulent purposes (18 U. S. C. 338);

Kansas Speculative Securities Act (Blue Sky Law) Chapter 17, Article 12; and The Illinois Securities Law, Chapter 121½, Sec. 96 et seq. of Illinois Revised Statutes of 1947. All of said above acts and laws are, by reference, adopted [fol. 9] and made a part hereof, as if specifically set forth herein.

20. The plaintiff has no complete and adequate remedy at law.

Wherefore, the plaintiff prays on behalf of himself and all other shareholders similarly situated who may be entitled to avail themselves of the benefit of this suit, that the status of the plaintiff and such other shareholders as shareholders of the Company, entitled as such to all of the rights and interests of such shareholders, be adjudged and determined, that plaintiff and such other shareholders receive their proper and lawful distributive shares of the alleged purchase price of the property transferred to the defendant Association, and their proper and lawful distributive shares of the full and true value of the properties transferred to the defendant Black; that, in addition, the plaintiff and all such other shareholders be adjudged the equitable owners, as their interests may appear, of all said shares and properties herein mentioned, that the defendants be decreed to hold all such shares and properties in trust for plaintiff and such other shareholders, and that the defendants be ordered and decreed to pay to the plaintiff and such other shareholders, as their interests may appear, all sums to which in justice and equity they may be entitled, and that the plaintiff and such other shareholders in order to secure the payment of said amounts, be given an equitable lien upon the assets and properties wrongfully transferred, or held in escrow; that the defendants and their agents, and each of them, be restrained and enjoined pending the final judgment herein from disposing or selling the properties wrongfully transferred to them as hereinbefore alleged, or the proceeds therefrom; that the defendants and each of them be required to account to the plaintiff and such other shareholders for all shares, monies and properties to which they may respectively be entitled; that the Court authorize and direct all

such actions as may be necessary or advisable in the premises, and that a receiver be appointed to collect and distribute for and on behalf of the Company, the plaintiff, and all such other shareholders, the amounts to which the plaintiff and such other shareholders may be entitled and to bring any and all suits at law or in equity not theretofore [fol. 10] commenced which may be necessary for that purpose; that the defendants be required to account to the plaintiff and such other shareholders for all earnings from the operation of the assets and properties of the Company from the time they were unlawfully transferred to any of the defendants; that the Secretary of State of the State of Illinois be required and directed to expunge from his records and files the purported Articles of Dissolution of the Company; and that the Court shall grant all other and further relief to which the plaintiff and other shareholders similarly situated may be entitled.

Dr. A. M. Amen.

[Verified.]

Sidley, Austin, Burgess & Harper. Carey, Lilleston, Spradling & Gott, Attorneys for Plaintiff.

In United States District Court

Summons (No. 3495)—July 7, 1950

To the above named Defendant: Black-Marshall Oil Company.

You are hereby summoned and required to file in the Clerk's Office at Wichita, Kansas, and serve upon Cunningham, Walker & Cunningham, plaintiff's attorneys, whose address is Arkansas City, Kansas, an answer to the complaint which is herewith served upon you, within 40 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

Copy of Complaint hereto attached.

Harry M. Washington, Clerk of the Court. By Fred J. Partridge, Deputy Clerk.

To Secretary of State, Topeka, Kansas. For service under 17-509 Gen. Stat. Kansas, 1935.

[Seal of Court]

[fol. 11] IN UNITED STATES DISTRICT COURT

RETURN—Filed July 10, 1950

State of Kansas—Executive Department

Office of Secretary of State

Received the within summons this 8th day of July, A. D., 1950, and served the same on the 8th day of July, A. D., 1950, by forwarding a true and correct copy thereof, with the endorsements thereon Complaint by registered mail, to Mr. Dale G. Ives, Secretary of Black-Marshall Oil Company, Aledo, Illinois—also Black-Marshall Oil Company, Aledo, Illinois.

Fee $3.00 paid.

In Testimony Whereof, I hereto set my hand and cause to be affixed my official seal. Done at the city of Topeka, this 8th day of July, A. D., 1950.

Larry Ryan, Secretary of State.

(Seal)

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO DISMISS CERTAIN PARTIES DEFENDANT AND TO FILE AN AMENDED COMPLAINT (No. 3495)—Filed July 25, 1950

Plaintiff, by his attorneys, moves the Court for leave to dismiss, without prejudice, the following parties defendant: National Cooperative Refinery Association, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, J. R. Sherrard,

Spencer I. Berglund, and for leave to file an amended complaint, a copy of which is attached hereto, on the ground that justice so requires in order that all issues between the parties may be fully litigated in this action and in order that the original allegations may be clarified to reflect facts discovered since the institution of this action.

Respectfully submitted,

Douglas F. Smith, W. L. Cunningham, Henry V. Gott, Attorneys for Plaintiff.

[fol. 12] AMENDED COMPLAINT (No. 3495).

A. M. Amen, the plaintiff herein, brings this complaint on behalf of himself and all other shareholders of Black-Marshall Oil Company who are similarly situated (sometimes hereinafter referred to collectively as the plaintiffs), said shareholders being so numerous as to make it impracticable to bring them all before the Court, against Black-Marshall Oil Company, a corporation (hereinafter sometimes referred to as the Company), Landowners Oil Association, a corporation, and William H. Black, president, director and shareholder of the Company, and respectfully represents as follows:

[Paragraph 1 is identical with paragraph 1 of the complaint printed at page 3.]

2. Defendant Black-Marshall Oil Company is a corporation organized under the laws of the State of Illinois and is a citizen of said State. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware, and is authorized to do business, and is doing business, in the State of Kansas, and said defendant's principal place of business in Kansas is in Great Bend, Kansas. Defendant William H. Black is a citizen of the State of California and resides in the City of La Jolla in said State.

3. This action is a suit of a civil nature in equity between citizens of different states, namely, the plaintiff and the de-

fendants and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00). The plaintiff avers that this action arises also under the Constitution and laws of the United States.

[Paragraph 4 is identical with paragraph 4 of the complaint printed at page 3.]

"5. At some time prior to July 1, 1947, the exact date or dates being unknown to the plaintiff, the defendant William H. Black and Dale G. Ives, and each of them, fraudulently, inequitably and unlawfully undertook to deprive the plaintiffs of their lawful and equitable interest in the stock and assets of the Company by a sale and transfer thereof to the National Cooperative Refinery Association, hereinafter [fol. 13] sometimes referred to as the Association, for and in consideration of the payment by the Association of certain sums of money hereinafter referred to as the purchase price.

6. At some time or times within the period described in paragraphs 4 and 5 above, the defendant William H. Black and Dale G. Ives, (secretary-treasurer, director and shareholder of the Company,) fraudulently, unlawfully and inequitably entered into a conspiracy and joint venture for the purpose of defrauding the plaintiffs of their shares of stock in said Company and thereby of their legal and equitable ownership of, and respective rights to, their proper distributive shares of the amount of said purchase price, and other property hereinafter mentioned in paragraph 14 hereof, and pursuant to said conspiracy and joint venture, said defendant William H. Black and Dale G. Ives purported to deprive the plaintiffs of their share of stock in said Company and of their lawful and equitable interest in and rights to said purchase price and other property hereinafter mentioned in paragraph 14 hereof, and converted the same for their own use and benefit and have ever since purported to deprive the plaintiffs of their interest in and rights to said shares, said purchase price, and said other property.

7. At some time or times within the period described in paragraphs 4 and 5 above, the defendant William H. Black conceived a scheme and design fraudulently and unlawfully to exploit the Company and to convert its funds, shares of stock and assets for his own use and benefit, and pursuant thereto, said defendant has fraudulently and unlawfully exploited the Company and has converted its funds, shares of stock and assets for his own use and benefit.

8. Pursuant to and as a part of the conspiracy, joint venture, scheme and design hereinbefore alleged:

(a) Defendant William H. Black and Dale G. Ives, at some time or times within the period described in paragraphs 4 and 5 above, without disclosure to or knowledge on the part of plaintiffs, undertook, agreed, and arranged that the stock and assets of the Company be fraudulently and unlawfully transferred to the Association;

[fol. 14] (b) With funds belonging to the Company and purportedly on behalf of the Company, the defendant William H. Black and Dale G. Ives accordingly arranged to purchase the shares of stock in the Company owned by the plaintiffs at prices, and on the basis of payments to the plaintiffs substantially less, and known by the defendant William H. Black and Dale G. Ives to be substantially less, than (1) the full and true value of said shares, and (2) the plaintiffs' respective proportionate shares and interests in the purchase price paid, or to be paid, by the Association, and in certain other property hereinafter mentioned in paragraph 14 hereof;

(c) Defendant William H. Black and Dale G. Ives undertook to acquire the said shares of stock from the plaintiffs so that, among other things, such shares of stock would be no longer outstanding, the consent of the plaintiffs to the transfer of assets of the Company would not be required, and the remaining shareholders would personally profit to a greater extent than would have been the case if the purchase price had been prorated among all of the shareholders of the Company, including the plaintiffs;

(d) Defendant William H. Black and Dale G. Ives falsely, fraudulently and unlawfully represented to the plaintiffs that a sale of a certain large portion of the assets

of the Company had been arranged for an amount of which the proportionate share of each of the Company's shareholders would be approximately eleven dollars ($11.00) per share and that the plaintiffs must immediately endorse their respective certificates in blank, deliver them to the defendant William H. Black and Dale G. Ives, and receive therefor approximately eleven dollars ($11.00) per share;

(e) Defendant William H. Black and Dale G. Ives falsely, fraudulently and unlawfully represented to the plaintiffs that the Company's interest in defendant Landowners Oil Association, a Delaware corporation, and certain undeveloped leases and other properties which were not included among the assets in the aforesaid sale and transfer had been retained for the benefit of plaintiffs;

(f) In connection with the purchases of securities herein described, the defendant William H. Black and Dale G. Ives [fol. 15] made use of the United States mails and of means and instrumentalities of interstate commerce,

(1) to employ the devices, schemes and artifices to defraud,

(2) to make the untrue statements of material facts and to omit to state the material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and

(3) to engage in the acts, practices and course of business which operated as a fraud and deceit upon the plaintiffs, all as herein set forth.

(g) Defendant William H. Black, in complete disregard of his duties and obligations as president and director of the Company:

(1) Caused to be issued to himself or for his benefit, both at the time of the original issue of stock of the Company and at various times thereafter, shares of stock of the Company for which said defendant gave no consideration or a wholly inadequate consideration and at all times thereafter said defendant pretended to be the owner of said shares, in fraud of the Company and the lawful and equitable interests of its other shareholders;

(2) Withdrew large sums of money from the treasury

of the Company for purposes other than proper corporate purposes and for his own personal use and benefit;

(3) Employed corporate funds to finance his personal business ventures for his own personal benefit and improperly obtained for himself business opportunities which said defendant, as an officer and director of the Company, was under a duty and obligation to secure for and on behalf of the Company and said defendant continuously exploited the Company for his own personal use and benefit.

9. Plaintiffs having been induced by and acting in complete reliance upon said false and fraudulent representations, and unaware of their false and fraudulent nature, and of the conspiracy and joint venture under and pursuant to which the defendant William H. Black and Dale G. [fol. 16] Ives were acting, did at various times during the years 1944 and 1945 endorse and deliver unto the defendant William H. Black and Dale G. Ives, certificates representing their respective shares of the Company, receiving therefor approximately eleven dollars ($11.00) per share; the plaintiffs were fraudulently induced to part with legal title to their said respective shares to or for the ultimate benefit of the defendant William H. Black and Dale G. Ives; in many of the aforesaid instances, funds borrowed by the Company were used to make said purchases and said funds were obtained through advances to the Company by the Association; on information and belief certain of said advances from the Association to the Company were in turn illegally and wrongfully loaned by the Company to the defendant William H. Black for the purpose of making said stock purchases, and, on information and belief, said shares so obtained from the plaintiffs were either held in the treasury of the Company or acquired by the defendant William H. Black for his own use and benefit, and pursuant to said conspiracy and joint venture.

10. On information and belief said purported purchases of its stock by the Company were in violation of the Business Corporation Act of the State of Illinois, under which the Company was incorporated and existing; the Company did not have net assets available therefor, which the defendant William H. Black and Dale G. Ives well knew.

11. Said purported purchases of the plaintiffs' stock were effected by false and fraudulent representations and by the failure of defendant William H. Black and Dale G. Ives to disclose material facts which said defendant William H. Black and Dale G. Ives were under a duty and obligation to disclose to the plaintiffs.

12. Defendant William H. Black and Dale G. Ives consummated their said conspiracy, joint venture, scheme and design, in part, by a purported sale and transfer of the said stock and assets of the Company to the Association for a price which, prorated among certain favored shareholders of the Company, not including any of the plaintiffs, resulted in a distributive proportion per share substantially in excess of any of the prices paid as aforesaid by the [fol. 17] defendant William H. Black and Dale G. Ives in purporting to purchase the shares of the plaintiffs. The plaintiffs did not know until May, 1949, of the fraudulent acts, conspiracy, joint venture, scheme and design as alleged in this complaint, and subsequently learned thereof by investigation.

13. Having consummated the conspiracy, joint venture, scheme and design, in part, as aforesaid by the purported sale and transfer of the said shares of stock and assets of the Company to the Association, the defendant William H. Black and Dale G. Ives then proceeded illegally to attempt and pretend to dissolve the Company. Purported Articles of Dissolution for the Company entitled "Articles of Dissolution Pursuant to Section 80 of 'The Business Corporation Act,'" were filed in the Office of the Secretary of State of Illinois on June 30, 1947. Said Articles of Dissolution were signed, purportedly on behalf of the Company, by the defendant William H. Black as its President and attested by Dale G. Ives as its Secretary, and said Articles of Dissolution falsely and fraudulently stated that, all debts, obligations and liabilities of the Company having been paid and discharged or adequately provided for, "All the remaining property and assets of the corporation [i.e., the Company] have been distributed among its shareholders, in accordance with their respective rights and interests."

14. The defendant Company legally or equitably owns the entire capital stock of the defendant Landowners Oil Association, and certain other properties not included in the aforesaid sale and transfer of properties to the National Cooperative Refinery Association. The said shares of stock of the defendant Landowners Oil Association and the other said properties referred to in this paragraph were not held or disposed of for the benefit of the plaintiffs, as it was represented by the defendant William H. Black and Dale G. Ives to the plaintiffs that they had been, but the plaintiffs aver on information and belief that said shares and properties were, as a part of said conspiracy and joint venture, transferred by the Company, in accordance with the terms of the sale to the Association, for a grossly inadequate consideration, and in fraud of the plaintiffs, to the defendant William H. Black, and that said shares and properties [fol. 18] or the proceeds thereof are now wrongfully held by the said defendant William H. Black, and in trust for the plaintiffs.

15. At all times mentioned herein the officers and directors of the Company including the defendant William H. Black and Dale G. Ives dominated and controlled the Company, and the plaintiff accordingly has not demanded that the Company or said officers or directors bring this action against the defendants because said demand would be futile.

[Paragraph 16 is identical with paragraph 16 of the complaint printed at page 8.]

17. Because of said conspiracy and joint venture, as set forth herein, the purported sale and the transfer to the defendants of the shares and properties referred to in this complaint are voidable; the plaintiffs are the equitable owners of such shares and properties, as their interests therein may appear, and the defendants hold all of the said shares and properties wrongfully transferred to them as aforesaid in trust for the plaintiffs.

18. As a result of the conspiracy and joint venture herein set forth, the defendant William H. Black received and caused to be distributed to favored shareholders of the Com-

"19. On information and belief, the conspiracy, joint venture, and unlawful acts of the defendants set forth herein violated the Federal Securities Act of 1933, May 27, 1933, 48 Stat. 74, as amended; Securities Exchange Act of 1934, June 6, 1934, 48 Stat. 881, as amended; Section 215 of the Federal Criminal Code proscribing the use of the mails for fraudulent purposes (18 U. S. C. 338); Kansas Speculative Securities Act (Blue Sky Law) Chapter 17, Article 12; and the Illinois Securities Law, Chapter 121½, Sec. 96 *et seq.* of the Illinois Revised Statutes of 1947. All of said above acts and laws are, by reference, adopted and made a part hereof, as if specifically set forth herein."

pany sums of money greatly in excess of their respective distributive rights and interests, and the said defendant is liable to the plaintiffs, as their interests may appear, for such excess payments.

[Paragraphs ~~19 and~~ 20 ~~are~~ identical with paragraphs ~~19 and~~ 20 of the complaint printed at pages ~~8 and~~ 9.]

Wherefore, the plaintiff prays on behalf of himself and all other shareholders similarly situated who may be entitled to avail themselves of the benefit of this suit, that the status of the plaintiff and such other shareholders as shareholders of the Company, entitled as such to all of the rights and interests of such shareholders, be adjudged and determined, that the plaintiff and such other shareholders similarly situated be restored to their rights, title and interests as shareholders of the Company, that the plaintiff and such other shareholders receive their proper and lawful distributive shares of the purchase price of the [fol. 19] property transferred to the Association, and their proper and lawful distributive shares of the full and true value of the properties transferred to the defendant Black; that the defendant William H. Black be required to account for all funds, shares of stock and assets of the Company converted to his own use and benefit and for all profits realized from all ventures undertaken in disregard and violation of his duties and obligations as director and officer of the Company; that, in addition, the plaintiff and all such other shareholders be adjudged the equitable owners, as their interests may appear, of all said shares and properties, that the defendants be decreed to hold all such shares and properties in trust for the plaintiff and such other shareholders, and that the defendants be ordered and decreed to pay to the plaintiff and such other shareholders, as their interests may appear, all sums to which in justice and equity they may be entitled, and that the plaintiff and such other shareholders in order to secure the payment of said amounts, be given an equitable lien upon the assets and properties wrongfully transferred to the defendants, or held in escrow by them; that the defendants and their agents, and each of them, be restrained and enjoined pending the final judgment herein from disposing or selling

the properties wrongfully transferred to them as hereinbefore alleged, or the proceeds therefrom; that the defendants and each of them be required to account to the plaintiff and such other shareholders for all shares, monies and properties to which they may respectively be entitled; and that the Court shall grant all other and further relief to which the plaintiff and other shareholders similarly situated may be entitled.

A. M. Amen.

Douglas F. Smith, W. L. Cunningham, Henry V. Gott, Martin M. Lucente, Attorneys for Plaintiff.

[Verified.]

Filed July 25, 1950.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO H. C. WADLEIGH, ET AL, TO INTERVENE (No. 3495)—September 25, 1950

This cause coming on to be heard on the motion of H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall, H. W. Riley, Gerald C. Baldwin, Spencer I. Berglund, John S. Bowers, Fred O. Brown, William Brown, Velma Brown, Vernon T. Clark, Grace Clark, Ruth Danford, Edith Hall, R. P. McBride, Mabel Nelson, E. W. Robinson, Maud E. Robinson, Maud T. Rogers, C. F. Runbom, Beulah Runbom, Clarence Stephens, Nancy Stephens, Ellen Wadleigh, Harry Ogle, and Fred Elving, and Hugh D. and Larry Stites, infants under the age of twenty-one years, by Lois L. Stites, their mother and next friend, for leave to intervene herein as members of the class on behalf of whom plaintiff has instituted the above entitled action, and to file their proposed complaint of intervention submitted with the said motion, the Court, upon consideration thereof and being fully advised in the premises, finds that said motion should be granted.

It is therefore ordered, adjudged, and decreed that the said applicants for intervention be, and they are hereby

given leave to intervene in, and they are hereby made parties to the above entitled cause.

Dated at Wichita, Kansas, this 25th day of September, 1950.

Enter:

Arthur J. Mellott, Chief Judge.

IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF H. C. WADLEIGH, ET AL. (No. 3495)—Filed July 25, 1950

H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall, H. W. Riley, Gerald C. Baldwin, Spencer I. Berglund, John S. Bowers, Fred O. Brown, William Brown, Velma Brown, Vernon T. Clark, Grace Clark, Ruth Danford, Edith Hall, R. P. McBride, Mabel Nelson, E. W. Robinson, Maud E. Robinson, Maud T. Rogers, C. F. Runbom, Beulah Runbom, Clarence Stephens, Nancy Stephens, Ellen Wadleigh, Harry Ogle and Fred Elving, and Hugh D. and Larry [fol. 21] Stites, infants under the age of twenty-one years, by Lois L. Stites, their mother and next friend, for their pleading in intervention, allege as follows:

1. Each of the interveners was a shareholder of the Black-Marshall Oil Company (hereinafter sometimes referred to as the Company), which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of the Company at all of the times of the transactions complained of herein.

[Paragraphs 2 to 17 are identical with paragraphs 5 to 20 of the amended complaint in case No. 3495 (printed at pages 12 to 18), with the exception that "interveners" appears instead of "plaintiff."]

Wherefore, the interveners pray that the status of the interveners as shareholders of the Company, entitled as such to all of the rights and interests of such shareholders, be adjudged and determined, that the interveners be restored to their rights, title and interest as shareholders of the Company, that the interveners receive their proper and lawful distributive shares of the purchase price of the property transferred to the Association, and their proper and lawful distributive shares of the full and true value of the properties transferred to the defendant Black; that the defendant William H. Black be required to account for all funds, shares of stock and assets of the Company converted to his own use and benefit and for all profits realized from all ventures undertaken in disregard and violation of his duties and obligations as director and officer of the Company; that, in addition, the interveners be adjudged the equitable owners, as their interests may appear, of all said shares and properties, that the defendants be decreed to hold all such shares and properties in trust for the interveners, and that the defendants be ordered and decreed to pay to the interveners, as their interests may appear, all sums to which in justice and equity they may be entitled, and that the interveners, in order to secure the pay-
[fol. 22] ment of said amounts, be given an equitable lien upon the assets and properties wrongfully transferred to the defendants, or held in escrow by them; that the defendants and their agents, and each of them, be restrained and enjoined pending the final judgment herein from disposing or selling the properties wrongfully transferred to them as hereinbefore alleged, or the proceeds therefrom; that the defendants and each of them be required to account to the interveners for all shares, monies and properties to which they may respectively be entitled; and that Court shall grant all other and further relief to which the interveners may be entitled.

[Signatures which follow are the same as names set out in first paragraph.]

[Verified by Interveners.]

[Signatures of counsel same as those to amended complaint.]

In United States District Court

Motion to Dismiss of William H. Black (No. 3495.)—August 21, 1950

Comes now William H. Black, and objecting to the filing of a complaint of intervention or an amended complaint herein, move the Court for an order of dismissal of said cause upon the grounds and for the reasons as follows:

First: That this action is identical with similar actions filed by the same plaintiff against the same defendants in the United States District Courts in the States of Illinois, New York, and California.

Second: That this action is identical with the action filed by A. M. Amen, et al., in this Court, and pending herein as Case No. 3509.

Third: That the plaintiff herein, and the parties seeking leave to file a complaint of intervention herein were all former stockholders of the Black-Marshall Oil Company, a corporation, and as defendant is informed and therefore alleges [fol. 23] the facts to be, took proceedings in the United States District Court for the Southern District of Illinois, in the action there entitled A. M. Amen v. Black-Marshall Oil Company, et al., being numbered Civil No. P. 1094, for the appointment of a receiver to represent all the stockholders and creditors of the Black-Marshall Oil Company, and on or about the 18th day of October, 1949, D. Arthur Walker and Fred E. Windish were appointed co-receivers of the Black-Marshall Oil Company in said case and Court.

Fourth: That said co-receivers, in said order of appointment, were vested with the property, rights, assets, and choses of action of the Black-Marshall Oil Company, and authorized to file and prosecute actions on its behalf.

Pursuant to said authorization, said co-receivers have filed in this Court their action, being entitled D. Arthur Walker, et al. v. William H. Black, et al., and being numbered W-143, in which action the receivers seek recovery from this defendant for the same alleged acts and to the same extent as was and is sought by the plaintiffs in the

stockholders' derivative suits pending in this Court, being this action and action numbered 3509.

Fifth: That the cause of action, if any, previously existing in said former stockholders, plaintiff in this action and plaintiffs in case No. 3509, and the parties seeking to intervene herein, has been transferred, lodged, and vested in the said co-receivers, who have the sole and exclusive right to maintain an action for the benefit of said corporation, Black-Marshall Oil Company and its stockholders, former stockholders, and creditors.

Sixth: That the further maintenance of this action either as originally commenced, by amended complaint, or by intervening complaint serves no purpose other than to vex, harass, and oppress this moving defendant.

Seventh: That by causing co-receivers to be appointed for the Black-Marshall Oil Company, the plaintiff herein and those seeking intervention, have elected to have any cause of action against this defendant prosecuted by said co-receivers and have estopped themselves from the right to prosecute in their individual names any cause of action based on the same transactions or circumstances.

[fol. 24] Wherefore, this moving defendant prays for an order:

(a) Denying the motion for leave to intervene;

(b) Denying the request of plaintiff to file an amended complaint; and

(c) Dismissing the entire action.

Geo. Siefkin, of Foulston, Siefkin Schoeppel Bartlett & Powers, Attorneys for defendant, William H. Black.

[Verification and proof of service on original.]

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL AS TO NATIONAL COOPERATIVE REFINING ASSOCIATION, ET AL. (No. 3495.)—SEPTEMBER 25, 1950

This cause coming on to be heard on the motion of plaintiff herein for leave to dismiss, without prejudice, certain parties defendant, and for leave to file an amended complaint herein, the Court, upon consideration thereof and being fully advised in the premises, finds that the said motion should be granted.

It is therefore ordered, adjudged and decreed that the following named defendants be, and they are hereby dismissed, without prejudice, as defendants herein: National Cooperative Refinery Association. Dale G. Ives, Leon F. Huff, Arthur W. Kincade, J. R. Sherrard, Spencer I. Berglund.

It is further ordered that the plaintiff herein may file instanter the amended complaint submitted with the aforesaid motion.

Dated at Wichita, Kansas, this 25th day of September, 1950.

Enter:

Arthur J. Mellott, Chief Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

MOTION OF D. ARTHUR WALKER, ET AL. TO INTERVENE AND TO DISMISS AS TO BLACK-MARSHALL OIL COMPANY (No. 3495.)—Filed September 22, 1950

Come now D. Arthur Walker and Fred E. Windish, duly appointed, qualified and acting co-receivers of the Black-Marshall Oil Company, defendant herein, as more fully set forth in the proposed complaint of intervention submitted herewith, and move the Court for an order permitting said co-receivers to intervene herein as parties-plaintiff and to file the attached complaint of intervention against the defendants herein, on the grounds that:

(1) The petitioners for intervention, as co-receivers of the property, rights, assets and things in action of the Black-Marshall Oil Company, have an interest in the subject matter of this action.

(2) The claims asserted by these petitioners for intervention and the claims asserted by the plaintiff herein have questions of law and fact in common.

(3) Intervention by the petitioners will not delay or prejudice the adjudication of the rights of the original parties, but on the contrary, the proposed intervention will facilitate an orderly and complete presentation of the facts and circumstances relating alike to the claims of the petitioners for intervention and the claims asserted by the plaintiff in the above entitled action.

Wherefore, petitioners respectfully pray that an order be made and entered herein, granting said petitioners leave to intervene as parties-plaintiff, and to file their proposed complaint of intervention, and that the Black-Marshall Oil Company be dismissed, without prejudice, as a party defendant.

Respectfully submitted,

W. L. Cunningham, Jack O. Brown, Burrel Barash,
Attorneys for Interveners.

[fol. 26] IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF D. ARTHUR WALKER, ET AL.
(No. 3495.)—Filed September 25, 1950.

D. Arthur Walker and Fred E. Windish, as co-receivers of the Black-Marshall Oil Company, defendant herein, for their pleading in intervention, allege and state as follows:

1. Intervener D. Arthur Walker is a citizen of the State of Kansas and resides in the City of Arkansas City in said State. Intervener Fred E. Windish is a citizen of the State of Illinois and resides in the City of Galesburg in said State.

2. Interveners' claim, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars ($3,000.00).

3. On the 18th day of October, 1949, in a certain action then pending in the United States District Court for the Southern District of Illinois, Northern Division, styled A. M. Amen vs. Black-Marshall Oil Company, et al., Civil No. P-1094, upon an application by plaintiff therein, an order was duly made and entered by said Court by which interveners were duly appointed co-receivers of the property, rights, assets and things in action of the Black-Marshall Oil Company (hereinafter sometimes referred to as the Company). Interveners duly qualified and entered upon the performance of their duties as such co-receivers and are performing the duties connected therewith. Copies of said order of appointment and of the complaint in said action were filed with this Court within ten days after the entry of said order of appointment, pursuant to the provisions of Title 28, United States Code, Section 754, June 25, 1948, 62 Stat. 923.

4. By the terms of said order of appointment, interveners were authorized and directed to intervene in such pending suits and actions as they might deem necessary or proper for the collection, protection, and distribution of the assets of the Black-Marshall Oil Company or its subsidiaries, and for the collection and liquidation of any claims, rights or causes of action of the Company, and to take all necessary and proper steps to carry out the terms of said order.

5. The complaint filed herein alleges in substance that plaintiff and other stockholders were defrauded of their [fol. 27] shares of stock in the Company by the defendant William H. Black and Dale G. Ives, purportedly purchasing such shares with funds of the Company and on behalf of the Company; that the plaintiff and other stockholders similarly situated remained in equity the owners of said shares; that the defendant William H. Black then consummated a sale of a large part of the Company's assets to the National Cooperative Refinery Association, and that

the purchase price paid by said Association was distributed by said defendant William H. Black to himself and other favored shareholders, not including any of the plaintiff and other stockholders similarly situated, all as more fully set out in pleadings of plaintiff on file herein.

6. By his action in causing said purchase price of the assets of the company, so sold and the remaining assets to be distributed to himself and other favored shareholders of the Company, thus pretending to deprive plaintiff and other stockholders similarly situated of their equitable interests therein, said defendant William H. Black misappropriated and converted to his own use and benefit, funds belonging to the Company and interveners are entitled to recover said funds for and on behalf of the shareholders legally and equitably entitled to share therein.

7. Said fraudulent purchases of its shares of stock purportedly on behalf of the Company by defendant William H. Black and Dale G. Ives were in violation of the Business Corporation Act of the State of Illinois (Illinois Revised Statutes, Chap. 32, Sec. 157.6), under which the Company was incorporated and existing; the Company did not have net assets available therefor, which defendant William H. Black and Dale G. Ives well knew.

8. Defendant William H. Black, President and director of the Company, both before and after its incorporation, continuously dominated and controlled and unlawfully exploited the Company and converted its funds, shares of stock and assets for his own use and benefit.

9. Defendant William H. Black caused to be issued and transferred to himself, both at the time of the original issue of stock in the Company and at various times thereafter, shares of stock in the Company for which said defendant [fol. 28] gave no consideration or a wholly inadequate consideration, and at all times thereafter said defendant William H. Black pretended to be the owner of said shares, in fraud of the Company and the lawful and equitable interests of its other shareholders.

10. At various times throughout his tenure as President and director of the Company, defendant William H. Black

withdrew large sums of money from the treasury of the Company for purposes other than proper corporate purposes, and for his own personal use and benefit.

11. At various times throughout his tenure as President and director of the Company, defendant William H. Black employed corporate funds and properties to finance and operate his personal business ventures for his own personal profit, and obtained for himself business opportunities which said defendant William H. Black was under a duty to secure for and on behalf of the Company, and said defendant William H. Black continuously exploited the Company for his own personal use and benefit, to the great injury and loss to the Company and its other shareholders.

12. Said defendant William H. Black fraudulently and unlawfully purchased valuable properties of the Company for a grossly inadequate consideration, and made sales to the Company for prices far in excess of the value of the properties thus sold, all to the benefit of said defendant William H. Black and to the great injury and loss to the Company and its other shareholders.

Wherefore, interveners pray that defendant William H. Black be decreed and required to account for and pay over to said interveners, for and on behalf of plaintiffs herein and all other legal and equitable shareholders of the Company entitled to share therein;

(1) All funds, assets, and other corporate properties fraudulently and wrongfully caused to be distributed by, received by, or converted and misappropriated to the personal use and benefit of said defendant, William H. Black;

(2) All proceeds of, profits from, or other gains derived from all shares of stock of the Company fraudulently and [fol. 29] unlawfully issued to, transferred to, or held by or for the benefit of said defendant, William H. Black;

(3) All funds of the Company improperly withdrawn or borrowed from the Company by said defendant, William H. Black;

(4) All gains, profits or proceeds realized by said defendant William H. Black as a result of personal business ventures operated or financed in whole or in part by prop-

erties or funds of the Company, or as a result of business opportunities which said defendant obtained for himself in violation of his duties and obligations to the Company;

(5) All gains, profits, or proceeds realized by said defendant William H. Black, as a result of purchases of properties, shares or assets from the Company, and sales of shares, properties, or assets to the Company by said defendant, William H. Black;

(6) All gains, profits, or proceeds realized by defendant William H. Black as a result of his domination, control and exploitation of the Company; and that the interveners may have such other and further relief as may to the Court seem just and equitable.

[Signatures which follow same as those set out in first paragraph.]

[Verified.]

[Signatures of counsel same as those to motion for leave to intervene.]

IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF KENNETH D. AND HAZEL CONSTANT (No. 3495.)—Filed February 10, 1951

Kenneth D. Constant and Hazel Constant, for their pleading in intervention, allege as follows:

1. Each of the interveners was a shareholder of the Black-Marshall Oil Company (hereinafter sometimes referred to as the Company), which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. De- [fol. 30] fendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of the Company at all of the times of the transactions complained of herein.

[Paragraphs 2 to 17 are identical with paragraphs 5 to 20 of the amended complaint in case No. 3495 (printed at pages 12 to 18), with the exception that "interveners" appears instead of "plaintiff".]

[The prayer is identical with the prayer of the interveners' complaint of H. C. Wadleigh et al., printed at page 21.]

[Signatures which follow same as those set out in first paragraph.]

[Verified.]

[Signatures of counsel same as those to amended complaint.]

IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF J. R. SHERRARD, ET AL.
(No. 3495.)—Filed February 10, 1951

J. R. Sherrard, J. K. Stevenson, Myrtle Lundblad and Mabelle Lundblad, all of whom are residents of Aledo, Mercer County, Illinois, and Roy Jones and Barney Ets-Hokin, both of whom are residents of Chicago, Cook County, Illinois, for their complaint in intervention, allege and state to the Court as follows:

1. Each of the interveners was a shareholder of the Black-Marshall Oil Company (hereinafter sometimes referred to as the Company), which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. Defendant, Landowners Oil Association, is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was President, director and shareholder of the Company at all of the times of the transactions complained of herein.

[fol. 31] [Paragraphs 2 to 17 are identical with paragraphs 5 to 20 of the amended complaint in case No. 3495 (printed at pages 12 to 18), with the exception that "interveners" appears instead of "plaintiff".]

[The prayer is identical with the prayer of the interveners' complaint of H. C. Wadleigh et al., printed at page 21.]

[Signatures which follow same as those set out in first paragraph.]

Collins, Williams, Hughes and Martin, Attorneys for Interveners.

[Verified.]

IN UNITED STATES DISTRICT COURT

ANSWER OF WILLIAM H. BLACK TO INTERVENERS' COMPLAINT OF D. ARTHUR WALKER, ET AL.
(No. 3495.)—Filed July 2, 1951

Now comes the defendant, William H. Black, and for answer to the complaint of intervention herein filed by the above named intervenors on the 25th day of September, 1950, pursuant to leave of Court, alleges, states, and avers:

First: Admits the allegations of paragraphs 1 and 2 of said complaint.

Second: Admits the appointment of intervenors but neither admits nor denies that their appointment was legal, and requests that intervenors be put on strict proof thereof.

Third: Answering paragraphs 5, 6, 7, 8, 9, 10, 11, and 12, defendant Black admits that the plaintiff's complaint in substance contains the allegations set forth in these paragraphs, but specifically denies the allegations therein contained.

Fourth: Answering further, defendant Black alleges that on July 14, 1950, the intervenors as alleged receivers of the Black-Marshall Oil Company filed an action in this Court entitled "D. Arthur Walker and Fred E. Windish, co-
[fol. 32] receivers of the Black-Marshall Oil Company, a corporation, v. William H. Black and Ruth F. Black", and numbered W-143, setting forth practically verbatim the al-

leged causes of action now sought to be reinvoked by the instant intervening complaint.

That due to the fact there is now pending and was pending at the time of filing this intervening complaint said case, numbered W-143, the intervening complaint is not maintainable. That upon appointment the receiver had a choice of commencing their own litigation or intervening in pending litigation and having once exercised their prerogative in the former alternative are estopped from now seeking to maintain the latter. That the intervenors are not proper parties to the alleged causes of action personal to the plaintiff. That any cause of action now sought to be asserted has long since been barred by the statute of limitations and the intervenors are guilty of laches.

Wherefore, defendant Black prays for a dismissal of said intervening complaint and for general relief.

[Counsel same as that to motion to dismiss, printed at page 24.]

Filed with proof of service July 2, 1951.

IN UNITED STATES DISTRICT COURT

ANSWER OF WILLIAM H. BLACK TO INTERVENERS' COMPLAINT OF H. C. WADLEIGH, ET AL. (No. 3495.)—Filed July 2, 1951

Now comes the defendant William H. Black and for answer to the complaint of intervention herein filed by the above named intervenors on the 25th day of July, 1950, pursuant to leave of Court, alleges, states, and avers:

First: Admits the corporate character of the Black-Marshall Oil Company as alleged in Paragraph 1 of intervenor's complaint but neither admits nor denies that each of the intervenors was a stockholder thereof at all times from January, 1940, through June, 1947, and requests that the intervenors be put on strict proof thereof.

Second: Denies the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of said complaint.

[fol. 33] Third: Answering paragraph 10 of said complaint, defendant Black denies each of the conclusions there-

in, admitting, however, that the Black-Marshall Oil Company was dissolved on June 30, 1947.

Fourth: Answering paragraph 11 of said complaint, defendant Black admits owning shares of stock in the defendant Landowners Oil Association but expressly denies the conclusion as alleged in this paragraph and expressly denies that the intervenors possess any interest whatsoever in the Association, each having parted with and sold same for good, sufficient, and valuable considerations.

Fifth: The defendant Black admits that no demand was made upon him to prosecute this action, allegedly in the nature of a stockholder's derivative suit. Answering further, however, defendant Black alleges that in an ex parte action in the United States District Court for the Southern District of Illinois, Northern Division, entitled A. M. Amen v. Black-Marshall Oil Company, et al., and numbered P-1094, upon order of that Court, D. Arthur Walker and Fred E. Windish were appointed co-receivers of the Black-Marshall Oil Company. That under the provisions of 28 U.S.C.A. 754, said receivers, by virtue of their order of appointment, have exclusive control of all Black-Marshall property. That the order of appointment cannot be attacked collaterally in this action. That no demand has been made upon the receivers to prosecute this action. That absent an allegation of demand upon said receivers or the futility thereof, the intervenors' complaint is not maintainable.

Sixth: Defendant Black admits the allegation of paragraph 13.

Seventh: Denies the allegations of paragraphs 14, 15, 16, and 17.

Answering further, defendant Black alleges that at the time of the filing of this intervening complaint there was pending and is now pending an action in this Court entitled D. Arthur Walker and Fred E. Windish, co-receivers of Black-Marshall Oil Company, a corporation v. William H. Black and Ruth F. Black, and numbered W-143. That any and all, each and every purported cause of action [fol. 34] attempted to be asserted by the intervenors is now being asserted by said co-receivers. That said co-receivers

have the exclusive authority to assert the That there is no allegation of the inadequacy of the repı itation of the co-receivers.

That the intervenors are guilty of lac in asserting their claim and that any alleged cause of on attempted to be asserted by them has long since bee barred by the statute of limitations.

Wherefore defendant prays for a dismis l of said complaint of intervention and for general relie:

[Signature same as that of motion to d niss.]

IN UNITED STATES DISTRICT COU T

ANSWER OF WILLIAM H. BLACK TO INTERVENE S' COMPLAINT OF KENNETH D. CONSTANT, ET AL. (No. 3495)—
Filed July 3, 1951

Now comes the defendant, William H. Black, and for answer to the complaint of intervention herein filed by the above named intervenors on the 18th day of January, 1951, alleges, states, and avers:

[Paragraphs "First" to "Seventh" are identical with paragraphs "First" to "Seventh" of the answer of William H. Black to interveners' complaint of H. C. Wadleigh et al., printed at pages 32 and 33.]

[The paragraph immediately following paragraph "Seventh" is identical with that of the answer of William H. Black to interveners' complaint of H. C. Wadleigh et al., with the exception that there is an additional sentence which reads "that no claim is asserted in addition to that asserted by the instant plaintiff".]

[The last paragraph and the prayer are identical with the last paragraph and the prayer of the answer of William H. Black to the interveners' complaint of H. C. Wadleigh et al., printed at page 34, above. Signature of counsel is also identical.]

Clerk's Note

[The answer of William H. Black to interveners' complaint of J. R. Sherrard et al. (case No. 3495) filed July 2, 1951, is identical with the answer to the interveners' complaint of Kenneth D. Constant et al., printed at page 34. Signature of counsel also identical.]

In United States District Court

Answer of William H. Black to Amended Complaint (No. 3495)—Filed July 9, 1951

Comes now the defendant, William H. Black, and for answer to the plaintiff's amended complaint, alleges, states, and avers:

First: Admits the allegation of residence of the plaintiff and this defendant.

Second: Admits the allegations of paragraph 3, that the Black Marshall Oil Company was incorporated in 1940, but neither admits nor denies that the plaintiff was a shareholder thereof at the time of each and all of the transactions of which he complains, and requests that he be put on strict proof thereof.

Third: Denies the allegations of paragraphs 5 and 6, and specifically denies that he entered into a scheme or conspiracy with Dale G. Ives, or that Ives was his agent or employee or acted as his spokesman.

Fourth: Denies the allegations of paragraph 7 and paragraphs 8 and 9, except in so far as they correctly reflect the record of the Black Marshall Oil Company or the actions taken by either the stockholders or directors in regularly called or constituted meetings, but specifically denies the conclusions drawn therefrom in the complaint.

Fifth: Denies the allegations of paragraphs 10, 11, 12, 13, and 14, admitting, however, that the Black Marshall Oil Company was dissolved on June 30, 1947.

Sixth: The defendant Black admits that no demand was made upon him to prosecute this action. Answering further, however, this defendant alleges that in an ex parte action in the United States District Court for the Southern District of Illinois, Northern Division, entitled A. M. Amen v. Black Marshall Oil Company, et al., and numbered P-[fol. 36] 1094, upon order of that Court, D. Arthur Walker and Fred E. Windish were appointed co-receivers of the Black Marshall Oil Company. That under the provisions of 28 U.S.C.A. 754, said receivers, by virtue of their order of appointment, have exclusive control of all Black Marshall property. That the order of appointment cannot be attacked collaterally in this action. That the plaintiff in his amended complaint makes no allegation that a demand has been made upon the receivers to prosecute this action. That absent an allegation of demand upon said receivers or the futility thereof, the plaintiff's action is not maintainable.

Seventh: Admits the allegations of paragraph 16 of plaintiff's complaint.

Eighth: Denies the allegations of paragraphs 17, 18, 19, and 20 of said complaint.

Answering further, this defendant alleges that at the time of the filing of the amended complaint there was pending and is now an action in this Court entitled D. Arthur Walker and Fred E. Windish, co-receivers of Black-Marshall Oil Company, a corporation, v. William H. Black and Ruth F. Black, and numbered W-143. That any and all, each and every purported cause of action attempted to be asserted by the plaintiff is now being asserted by said co-receivers. That there is no allegation of the inadequacy of the representation of the co-receivers. That said co-receivers have the exclusive authority to assert alleged corporate causes of action and their election to commence the aforementioned action in this Court abates the instant suit.

That the plaintiff is guilty of laches in asserting this claim, and that any alleged cause of action attempted to be asserted by him has long since been barred by the statute of limitations.

That this action is allegedly in the nature of a corporation derivative suit, and therefore the plaintiff is strictly

limited to assert only a cause of action in behalf of the corporation and one that inures exclusively to it. That the plaintiff cannot be heard to here assert any alleged personal fraud action which would be maintainable only on his personal behalf.

[fol. 37] Answering further, defendant alleges that plaintiff cannot in an alleged derivative suit attempt to assert any personal cause of action in behalf of a group and not expressly in the corporate behalf; and, further, that this action is not a proper class action brought in behalf of a clear and definable class but is an attempt to intermingle with a derivative action numerous alleged fraud causes of action inuring to and existing in favor of parties who do not come within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure.

Wherefore, defendant prays for judgment that the complaint of plaintiff be dismissed with costs to the plaintiff.

[Signature of counsel identical with that of other answers.]

IN UNITED STATES DISTRICT COURT

No. 3509

A. M. AMEN, ET AL., Plaintiffs,

v.

BLACK-MARSHALL OIL COMPANY, ET AL., Defendants.

PETITION FOR REMOVAL—Filed July 15, 1949

Come now the defendants, National Cooperative Refinery Association, a corporation, Landowners Oil Association, a corporation, William H. Black, Ruth F. Black, and Leon F. Huff, and file this petition for removal of this cause from the District Court of McPherson County, Kansas, in which said action is pending and undisposed of, to the District Court of the United States in and for the District of Kansas, Second Division, and in support of said petition allege:

First: That no part of the cause of action alleged in said petition has been tried or determined, and that said pending action is within the jurisdiction of this Court and is a civil action of which this Court has jurisdiction.

Second: That the plaintiffs herein, as petitioners are informed and therefore allege the facts to be, are residents and citizens of the states of South Dakota and Illinois.
[fol. 38] That the defendants above named are residents and citizens of the states of Kansas, Delaware, and California.

That while there are named as defendants in said petition certain individuals who are residents of the same state of which the plaintiffs are residents, to-wit: the state of Illinois, that no service has been, and petitioners allege on information and belief, can be obtained, and that this action now stands and must proceed as one wholly between citizens of different states, none of the defendants upon whom service is obtained residing in the same state in which any of the plaintiffs reside, and that being one between citizens of different states is a civil action involving more than $3,000.00 exclusive of interest and costs of which this Court has jurisdiction.

Third: That the petitioners file herewith a good and sufficient bond as provided by statute that the petitioners will pay the costs and disbursements incurred by reason of these removal proceedings should it be determined that this cause was not removable or was improperly removed.

Fourth: That attached hereto as Exhibit A, is a true and correct copy of the petition filed in the District Court of McPherson County, Kansas. That no other pleadings have been filed in said cause except the issuance of summons and the return thereon, and entries of appearance on behalf of the defendants, William H. Black and Ruth F. Black.

Foulston, Siefkin, Schoeppel, Bartlett & Powers,
By: Geo. Siefkin, Attorneys for petitioners, National Cooperative Refinery Association, et al.

[Verified.]

Filed with exhibit A, July 15, 1949.

Exhibit A to Petition for Removal

Supreme Court of the State of New York, County of New York. A. M. Amen, H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall and H. W. Riley, Plaintiffs, vs. [fol. 39] Black-Marshall Oil Company, a corporation, National Cooperative Refinery Association, a corporation, Landowners Oil Association, a corporation, William H. Black, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, O. A. Beech, J. R. Sherrard, Spencer I. Berglund, Earl H. Hatcher, Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Walter H. Beech, Ruth F. Black, William F. Black, Howard S. Bryant, Fayette B. Dow, Walter G. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, a corporation, Edward Roos, Smith, et al. Trustees for Joan Birnie Hamill, Smith, et al., Trustees for Elizabeth Byron Smith, Smith, et al., Trustees for Harold Byron Smith, Smith, et al., Trustees for Anne Byron Waud, and Smith, et al., Trustees for Emily Birnie Smith, Defendants. No.....

Complaint

A. M. Amen, H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall and H. W. Riley, plaintiffs herein, bring this complaint on behalf of themselves and all other shareholders of Black-Marshall Oil Company who are similarly situated, all said shareholders being sometimes hereinafter referred to collectively as the plaintiffs, against Black-Marshall Oil Company, a corporation (hereinafter sometimes referred to as the Company), Landowners Oil Association, a Delaware corporation, National Refinery Association, a Kansas corporation (hereinafter sometimes referred to as the Association), William H. Black, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, O. A. Beech, J. R. Sherrard, Spencer I. Berglund, and Earl H. Hatcher, acting as an agent of the Association (hereinafter sometimes collectively referred to as the defendants); and Cecil C. Anderson, Gladys H. Anderson, Lottie H. Anderson, Walter H. Beech, Ruth R. Black, William F. Black, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts,

Mary C. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, a corporation, Edward Roos, Smith, et al., Trustees for Joan Birnie Hamill, Smith, et al., Trustees for Elizabeth Byron Smith, et al., Trustees for Harold Byron Smith, [fol. 40] Smith et al., Trustees for Anne Byron Waud and Smith, et al., Trustees for Emily Birnie Smith (hereinafter named specifically whenever referred to), and respectfully represents as follows:

1. Each of the plaintiffs was a shareholder of Black-Marshall Oil Company, which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. Defendant National Cooperative Refinery Association is a corporation organized under the laws of the State of Kansas. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of Black-Marshall Oil Company at all of the times of the transactions complained of herein. Defendant Dale G. Ives was secretary-treasurer, director and shareholder of Black-Marshall Oil Company at all of the times of the transactions complained of herein. Defendant Leon F. Huff was assistant secretary-treasurer, director and shareholder of Black-Marshall Oil Company at all of the times of the transactions complained of herein. Defendant Arthur W. Kincade was director and shareholder of Black-Marshall Oil Company during certain of the times of the transactions complained of herein, Defendant O. A. Beech was director and shareholder of Black-Marshall Oil Company at certain of the times of the transactions complained of herein. Defendant J. R. Sherrard was director and a shareholder of Black-Marshall Oil Company during certain of the times of the transactions complained of herein. Defendant Spencer I. Berglund was director and shareholder of Black-Marshall Oil Company during certain of the times of the transactions complained of herein and defendant Earl H. Hatcher was agent of the National Cooperative Refinery Association at all of the times of the transactions complained of herein. Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Walter H. Beech, Ruth F. Black, Wil-

liam F. Black, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, a corporation, Edward Roos, Smith, et al., Trustees for Joan Birnie Hamill, Smith, et al., Trustees [fol. 41] for Elizabeth Byron Smith, Smith et al., Trustees for Harold Byron Smith, Smith, et al., Trustees for Anne Byron Waud, and Smith, et al., Trustees for Emily Birnie Smith are named as defendants herein because they received distributive proportions per share on the shares of stock of the company held by them substantially in excess of the amounts to which each of them was entitled in law and in equity and substantially in excess of any of the prices paid by the defendants in purporting to purchase the shares of the plaintiffs, all as hereinafter set forth.

[Paragraphs 2 to 12 of the complaint are identical with paragraphs 5 to 15 of the complaint in case No. 3495, printed at pages 3 to 8.]

[Paragraph 13 of the complaint is identical with paragraph 17 of the complaint in case No. 3495, printed at page 8.]

14. As a result of the conspiracies and joint ventures herein set forth, the defendant shareholders and other favored shareholders of the Company, including the defendants Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Walter H. Beech, Ruth F. Black, William F. Black, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgome-y, Ruth Kellogg Orr, H. O. Peet & Company, a corporation, Edward Roos, Smith, et al., Trustees for Joan Birnie Hamill, Smith, et al., Trustees for Elizabeth Byron Smith, Smith, et al., Trustees for Harold Byron Smith, Smith, et al., Trustees for Anne Byron Waud, and Smith, et al., Trustees for Emily Birnie Smith, received in the form of liquidating dividends from the company or otherwise, amounts greatly in excess of their respective distributive rights and interests, and plaintiffs are the equitable owners, as their interests may appear, of such excess payments to said persons, and each and all of said persons

are indebted to plaintiffs for said excess amounts and hold the same in trust for plaintiffs.

[Paragraph 15 of the complaint is identical with paragraph 19 of the complaint in case No. 3495, printed at page 8.]

[fol. 42] 16. The plaintiffs have no complete and adequate remedy at law, and the amounts and the relief sought herein are within the jurisdiction of this Court.

[The prayer of this complaint is identical with that set out in the complaint in case No. 3495, printed at page 9, with the exception that herein reference is made to plaintiffs, and with the further exception that the language, "and the defendants Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Walter H. Beech, Ruth F. Black, William F. Black, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, a corporation, Edward Roos, Smith. et al., Trustees for Joan Birnie Hamill, Smith, et al., Trustees for Elizabeth Byron Smith, Smith, et al., Trustees for Harold Byron Smith, Smith, et al., Trustees for Anne Byron Waud, and Smith, et al., Trustees for Emily Birnie Smith", precedes the language, "and each of them be required to account to the plaintiffs and such other shareholders for all shares, monies and properties to which they may respectively be entitled;" lines 32 to 35, page 9 of this record.]

Cleary, Gottlieb, Friendly & Cox, Attorneys for the Plaintiffs.

Illinois attorneys for Plaintiffs: Sidley, Austin, Burgess & Harper.

IN UNITED STATES DISTRICT COURT

CLERK'S NOTE

[An approved bond on removal was filed July 15, 1949.]

IN UNITED STATES DISTRICT COURT

CLERK'S NOTE

[A notice of removal, to which is attached an acknowledgment of service, was filed July 15, 1949.]

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO DISMISS CERTAIN DEFENDANTS AND TO FILE AMENDED COMPLAINT (No. 3509)—Filed July 25, 1950

Plaintiffs, by their attorneys, move the Court for leave to dismiss, without prejudice, the following parties defendant: National Cooperative Refinery Association, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, J. R. Sherrard, [fol. 43] Spencer I. Berglund, Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, Edward Roos, Smith, et al., Trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Byron Smith, Anne Byron Waud, and Emily Birnie Smith, and for leave to file an amended complaint, a copy of which is attached hereto, on the ground that justice so requires in order that all issues between the parties may be fully litigated in this action and in order that the original allegations may be clarified to reflect facts discovered since the institution of this action.

Respectfully submitted,

Douglas F. Smith, W. L. Cunningham, Henry V. Gott, Attorneys for Plaintiffs.

AMENDED COMPLAINT (No. 3509)

A. M. Amen, H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall and H. W. Riley, plaintiffs herein, bring this complaint on behalf of themselves and all other shareholders of Black-Marshall Oil Company who are simi-

larly situated, sometimes hereinafter referred to collectively as the plaintiffs, said shareholders being so numerous as to make it impracticable to bring them all before the Court, against Black-Marshall Oil Company, a corporation (hereinafter sometimes referred to as the Company), Landowners Oil Association, a corporation organized under the laws of the State of Delaware and authorized to do business, and doing business, in the State of Kansas, William H. Black, Ruth F. Black and William F. Black, and respectfully represent as follows:

1. Each of the plaintiffs was a shareholder of Black-Marshall Oil Company, which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. Defendant [fol. 44] Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of Black-Marshall Oil Company at all of the times of the transactions complained of herein. Defendants Ruth F. Black and William F. Black were shareholders of the Company.

[Paragraph 2 is identical with paragraph 5 of the amended complaint in case No. 3495 (printed at page 12), with the exception that the words "secretary-treasurer" follow the names "William H. Black and Dale G. Ives."]

[Paragraph 3 is identical with paragraph 6 of the amended complaint in case No. 3495 (printed at page 13), with the exception that the words "secretary-treasurer, director and shareholder of the company" do not follow the names William H. Black and Dale G. Ives.]

[Paragraphs 4, 5 and 5(a) are identical with paragraphs 7, 8 and 8(a) of the amended complaint in case No. 3495, printed at page 13.]

[Paragraph 5(b) is identical with paragraph 8(b) of the amended complaint in case No. 3495 (printed at page 14), with the exception that the last clause of paragraph 5(b) herein reads: "(2) the plaintiffs' respective proportionate shares and interests in the alleged purchase price paid, or

to be paid, by the Association, and in certain other property hereinafter mentioned in paragraph 11 hereof;"]

[Paragraphs 5(c) to 5(g), inclusive, are identical with paragraphs 8(c) to 8(g), inclusive, of the amended complaint in case No. 3495, printed pages 14 and 15.]

[Paragraphs 6 to 10 inclusive are identical with paragraphs 9 to 13 inclusive of the amended complaint in case No. 3495, printed pages 15 to 17.]

[Paragraph 11 is identical with paragraph 14 of the amended complaint in case No. 3495 (printed page 17) with the exception that paragraph 11 herein begins "The Company" rather than the "The Defendant Company" as in case No. 3495, and with the further exception that the language, "conspiracies and joint ventures" appears herein rather than "conspiracy and joint venture" as in case No. 3495.]

[fol. 45] [Paragraph 12 is identical with paragraph 15 of the amended complaint in case No. 3495 (printed page 18) with the exception that the language, "defendant, officers and directors of the company" appears herein rather than "officers and directors of the company" as in case No. 3495.]

[Paragraph 13 is identical with paragraph 17 of the amended complaint in case No. 3495 (printed page 18) with the exception that the language, "conspiracies and joint ventures" appears herein rather than "conspiracy and joint venture" as in case No. 3495.]

14. As a result of the conspiracy and joint ventures herein set forth, the defendant William H. Black received, and caused to be distributed to favored shareholders of the Company, including defendants Ruth F. Black and William F. Black, sums of money greatly in excess of their respective distributive rights and interests, and the said defendants are liable to the plaintiffs, as their interests may appear, for such excess payments.

~~[Paragraph 15 is identical with paragraph 19 of the complaint in case No. 3495, printed at page 8.]~~

"15. On information and belief, the conspiracy, joint venture, and unlawful acts of the defendants set forth herein violated the Federal Securities Act of 1933, May 27, 1933, 48 Stat. 74, as amended; Securities Exchange Act of 1934, June 6, 1934, 48 Stat. 881, as amended; Section 215 of the Federal Criminal Code proscribing the use of the mails for fraudulent purposes (18 U. S. C. 338); Kansas Speculative Securities Act (Blue Sky Law) Chapter 17, Article 12; and The Illinois Securities Law, Chapter 121½, Sec. 96 *et seq.* of Illinois Revised Statutes of 1947. All of said above acts and laws are, by reference, adopted and made a part hereof, as if specifically set forth herein."

16. The plaintiffs have no complete and adequate remedy at law, and the amounts and the relief sought herein are within the jurisdiction of this Court.

[The prayer of this amended complaint is identical with that of the amended complaint in case No. 3495, printed at page 18.]

[Signatures which follow are the same as those set out in first paragraph.]

[Verified.]

[Signatures of counsel same as those to amended complaint, case No. 3495.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING GERALD C. BALDWIN, ET AL. LEAVE TO INTERVENE (No. 3509)—September 25, 1950

This cause coming on to be heard on the motion of Gerald C. Baldwin, Spencer I. Berglund, John S. Bowers, Fred O. Brown, William Brown, Velma Brown, Vernon [fol. 46] T. Clark, Grace Clark, Ruth Danford, Edith Hall, R. P. McBride, Mabel Nelson, E. W. Robinson, Maud E. Robinson, Maud T. Rogers, C. F. Runbom, Beulah Runbom, Clarence Stephens, Nancy Stephens, Ellen Wadleigh, Harry Ogle, and Fred Elving, and Hugh D. and Larry Stites, infants under the age of twenty-one years, by Lois L. Stites, their mother and next friend, for leave to intervene herein as members of the class on behalf of whom plaintiffs have instituted the above entitled action, and to file their proposed complaint of intervention submitted with the said motion, the Court, upon consideration thereof and being fully advised in the premises, finds that said motion should be granted.

It Is Therefore Ordered, Adjudged, and Decreed that the said applicants for intervention be, and they are hereby given leave to intervene in, and they are hereby made parties to the above entitled cause.

It Is Further Ordered that said applicants may file instanter their proposed complaint of intervention herein.

Defendants' time to file answer shall be enlarged to include a period of twenty (20) days after the deposition of plaintiffs and intervenors have been taken by defendants.

Dated at Wichita, Kansas, this 25th day of September, 1950.

Enter:

Arthur J. Mellott, Chief Judge.

IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF GERALD C. BALDWIN, ET AL. (No. 3509).—Filed July 25, 1950

Gerald C. Baldwin, Spencer I. Berglund, John S. Bowers, Fred O. Brown, William Brown, Velma Brown, Vernon T. Clark, Grace Clark, Ruth Danford, Edith Hall, R. P. McBride, Mabel Nelson, E. W. Robinson, Maud E. Robinson, Maud T. Rogers, C. F. Runbom, Beulah Runbom, Clarence Stephens, Nancy Stephens, Ellen Wadleigh, Harry Ogle, and Fred Elving, and Hugh D. and Larry Stites, [fol. 47] infants under the age of twenty-one years, by Lois L. Stites, their mother and next friend, for their pleading in intervention, allege as follows:

1. Each of the interveners was a shareholder of Black-Marshall Oil Company, which was incorporated under the laws of the State of Illinois in 1940 (hereinafter sometimes referred to as the Company), at all of the times of the transactions of which they complain herein. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of Black-Marshall Oil Company at all of the times of the transactions complained of herein. Defendants Ruth F. Black and William F. Black were shareholders of the Company.

[Paragraph 2 is identical with paragraph 5 of the amended complaint in case No. 3495 (printed at page 12),

with the exception that the words "secretary-treasurer, director and shareholder of the company" follow the names William H. Black and Dale G. Ives. "Interveners" appears herein instead of "plaintiffs".]

[Paragraph 3 is identical with paragraph 6 of the amended complaint in case No. 3495 (printed at page 13), with the exception that the words "secretary-treasurer, director and shareholder of the company" do not follow the names William H. Black and Dale G. Ives.]

[Paragraphs 4, 5 and 5(a) are identical with paragraphs 7, 8 and 8(a) of the amended complaint in case No. 3495 (printed at page 13).]

[Paragraph 5(b) is identical with paragraph 8(b) of the amended complaint in case No. 3495 (printed at page 14), with the exception that the last clause of paragraph 5(b) reads "(2) The plaintiffs' respective proportionate shares and interests in the alleged purchase price paid, or to be paid, by the Association, and certain other property hereinafter mentioned in paragraph 11 hereof;"]

[Paragraphs 5(c) to 5(g) and paragraphs 6 to 10 are identical with paragraphs 8(c) to 13 of the amended complaint in case No. 3495 *(printed at pages 14 to 17).*]

[fol. 48] [Paragraph 11 is identical with paragraph 14 of the amended complaint in case No. 3495 (printed at page 17), with the exception that paragraph 11 herein begins "the company" rather than "the defendant company" as in case No. 3495, and the further exception that the language "conspiracies and joint ventures" appears herein rather than "conspiracy and joint venture" as in case No. 3495.]

[Paragraph 12 is identical with paragraph 15 of the amended complaint in case No. 3495 (printed at page 18), with the exception that the language "defendant officers and directors of the company" appears herein rather than "officers and directors of the company" as in case No. 3495.]

[Paragraph 13 is identical with paragraph 17 of the amended complaint in case No. 3495 (printed at page 18), with the exception that the language "conspiracies and joint ventures" appears herein rather than "conspiracy and joint venture" as in case No. 3495.]

[Paragraph 14 is identical with paragraph 14 of the amended complaint in case No. 3509 (printed at page 45).]

[Paragraph 15 is identical with paragraph 19 of the amended complaint in case No. 3495 (printed at page 18).]

[Paragraph 16 is identical with paragraph 16 of the amended complaint in case No. 3509 (printed at page 45).]

[The prayer is identical with the prayer of the interveners' complaint of H. C. Wadleigh et al., printed at page 21.]

[Signatures which follow are the same as the names set out in the first paragraph.]

[Verified.]

[Signatures of counsel, same as those to amended complaint, case No. 3495.]

[fol. 49] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS OF WILLIAM H. BLACK, ET AL. (No. 3509)—Filed August 21, 1950

Come now William H. Black and Ruth F. Black, and objecting to the filing of a complaint of intervention or an amended complaint herein, move the Court for an order of dismissal of said cause upon the grounds and for the reasons as follows:

First: That this action is identical with similar actions filed by the same plaintiffs against the same defendants in the United States District Courts in the States of Illinois, New York, and California.

Second: That this action is identical with a similar action filed by the plaintiff, A. M. Amen, in the District Court of McPherson County, Kansas, removed to this Court and pending herein as Case No. 3495.

Third: That the plaintiffs herein, and the parties seeking leave to file a complaint of intervention herein, were all former stockholders of the Black-Marshall Oil Company, a

corporation, and as defendants are informed and therefore allege the facts to be, took proceedings in the United States District Court for the Southern District of Illinois, in the action there entitled, A. M. Amen v. Black-Marshall Oil Company, et al., being numbered Civil No. P. 1094, for the appointment of a receiver to represent all the stockholders and creditors of the Black-Marshall Oil Company, and on or about the 18th day of October, 1949, D. Arthur Walker and Fred E. Windish were appointed co-receivers of the Black-Marshall Oil Company in said case and Court.

Fourth: That said co-receivers, in said order of appointment, were vested with the property, rights, assets, and choses of action of the Black-Marshall Oil Company, and authorized to file and prosecute actions on its behalf.

Pursuant to said authorization, said co-receivers have filed in this Court their action being entitled D. Arthur Walker, et al., v. Wm. H. Black, et al., being number W-143, in which action the receivers seek recovery from these moving defendants for the same alleged acts and to the same extent as was and is sought by the plaintiffs in the stockholders' derivative suits pending in this Court, being this action numbered 3549.

[fol. 50] Fifth: That the cause of action, if any, previously existing in said former stockholders, plaintiffs in this action and in case No. 3549, and the parties seeking to intervene herein, has been transferred, lodged, and vested in the said co-receivers, who have the sole and exclusive right to maintain an action for the benefit of said corporation, Black-Marshall Oil Company and its stockholders, former stockholders, and creditors.

Sixth: That the further maintenance of this action either as originally commenced, by amended complaint or by intervening complaint serves no purpose other than to vex, oppress, and harass these moving defendants.

Seventh: That by causing co-receivers to be appointed for the Black-Marshall Oil Company, the plaintiffs herein and those seeking intervention have elected to have any cause of action against these defendants prosecuted by said

co-receivers and have estopped themselves from the right to prosecute in their individual names any cause of action based on the same transactions or circumstances.

Wherefore, these moving defendants pray for an order:

(a) Denying the motion for leave to intervene;

(b) Denying the requests of plaintiffs to file an amended complaint; and

(c) Dismissing the entire action.

[Verified.]

[Signatures of counsel same as that to petition for removal.]

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL AS TO CERTAIN DEFENDANTS
(No. 3509)—September 25, 1950

This cause coming on to be heard on the motion of plaintiffs herein for leave to dismiss, without prejudice, certain parties defendant, and for leave to file an amended complaint therein, the Court, upon consideration thereof, and being fully advised in the premises, finds that the said motion should be granted.

[fol. 51] It Is Therefore Ordered, Adjudged And Decreed that the following named defendants be, and they are hereby dismissed, without prejudice, as defendants herein:

National Cooperative Refinery Association, Dale G. Ives, Leon F. Huff, Arthur W. Kincade, J. R. Sherrard, Spencer I. Berglund, Cecil C. Anderson, Gladys M. Anderson, Lottie H. Anderson, Howard S. Bryant, Fayette B. Dow, Walter C. English, Frank Fritts, Mary G. Fritts, Jas. H. Graham, Edith Hahn, Jesse S. Montgomery, Ruth Kellogg Orr, H. O. Peet & Company, Edward Roos Smith, et al., Trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Byron Smith, Anne Byron Waud, and Emily Birnie Smith.

It Is Further Ordered that the plaintiffs herein may file instanter the amended complaint submitted with the aforesaid motion.

Dated at Wichita, Kansas, this 25th day of September, 1950.

Enter:

Arthur J. Mellott, Chief Judge.

IN UNITED STATES DISTRICT COURT

CLERK'S NOTE

[The motion for leave to intervene of D. Arthur Walker and Fred L. Windish, filed Sept. 25, 1950, and their intervening complaint filed Nov. 25, 1950, in case No. 3509 are identical with the motion and complaint filed in case No. 3495, printed pages 25 and 26.]

IN UNITED STATES DISTRICT COURT

MOTION OF KENNETH D. CONSTANT, ET AL. FOR LEAVE TO INTERVENE (No. 3509)—Filed January 18, 1951

Kenneth D. Constant and Hazel Constant, by their attorneys, move the Court for an order permitting them to intervene herein as members of the class on behalf of whom plaintiffs have instituted the above entitled action, and to file the proposed pleading submitted herewith, on the following grounds:

1. The claims asserted by these applicants for intervention and the claims asserted by plaintiffs in the above en- [fol. 52] titled action have questions of law or fact in common, and the applicants have an interest in the subject matter of this suit.

2. The complaint in the above entitled action recites that the action is instituted on behalf of the named plaintiffs and all other shareholders of the Black-Marshall Oil Company who are similarly situated. These applicants for intervention are such similarly situated shareholders, as shown by the proposed pleading submitted herewith.

3. Intervention by these applicants will not delay or prejudice the adjudication of the rights of the original parties herein.

4. The transactions of which the plaintiffs complain and those of which the applicants complain are the same, and the proposed intervention will thus obviate a multiplicity of suits involving the same facts and occurrences, and will facilitate an orderly and complete presentation of the facts and circumstances relating alike to the claims of the applicants and plaintiffs in the above entitled action.

[Signatures of counsel, same as those to amended complaint, case 3495, printed page 19.]

IN UNITED STATES DISTRICT COURT

INTERVENERS' COMPLAINT OF KENNETH D. CONSTANT, ET AL. (No. 3509)—Filed February 10, 1951

Kenneth D. Constant and Hazel Constant, for their pleading in intervention, allege as follows:

1. Each of the interveners was a shareholder of the Black-Marshall Oil Company (hereinafter sometimes referred to as the Company), which was incorporated under the laws of the State of Illinois in 1940, at all of the times of the transactions of which they complain herein. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware. Defendant William H. Black was president, director and shareholder of the Company at all of the times of the transactions complained of herein.

[fol. 53] [Paragraphs 2 to 17 are identical with paragraphs 5 to 20 of the amended complaint, case No. 3495 (printed pages 12 to 18), with the exception that "interveners" appears instead of "plaintiff".]

[The prayer is identical with the prayer to the interveners' complaint of H. C. Wadleigh et al., printed at page 22.]

[Verified.]

[Signatures of counsel same as those to amended complaint.]

In United States District Court

Answer of Defendants William H. Black, et al. to Interveners' Complaint of Kenneth D. Constant, et al. (No. 3509)—Filed July 2, 1951

Now come the defendants, William H. Black, Ruth F. Black, and William F. Black, and for answer to complaint of intervention herein filed by the above named intervenors on the 18th day of January, 1951, allege, state, and aver:

[The language which follows is identical with that set out in the answer of William H. Black to interveners' complaint of Kenneth D. Constant, et al., case No. 3495, printed page 34.]

[Signature of counsel identical with that of other answers.]

In United States District Court

Answer of William H. Black, et al. to Interveners' Complaint of Gerald C. Baldwin, et al. (No. 3509)—Filed July 2, 1951

Now come the defendants, William H. Black, Ruth F. Black, and William F. Black, and for answer to the complaint of intervention herein filed by the above named intervenors on the 25th day of July, 1950, allege, state, and aver:

[Paragraphs "First" to "Fifth" are identical with para-
[fol. 54] graphs "first" to "fifth" of the answer of William H. Black to interveners' complaint of H. C. Wadleigh, et al., case No. 3495, printed at page 32.]

Sixth: Denies the allegations of paragraphs 13, 14, 15 and 16.

[The following paragraph is identical with that of the answer of William H. Black to interveners' complaint of H. C. Wadleigh, et al., (case No. 3495), with the exception that there is an additional sentence which reads "that no claim is asserted in addition to that asserted by the instant plaintiff."]

[The last paragraph and the prayer are identical with the last paragraph and the prayer of the answer of William H. Black to the inter-eners' complaint of H. C. Wadleigh, et al., case No. 3509, printed at page 34.]

[Signature of counsel identical with that of other answers.]

IN UNITED STATES DISTRICT COURT

ANSWER OF WILLIAM H. BLACK, ET AL. TO INTERVENERS' COMPLAINT OF D. ARTHUR WALKER, ET AL. (No. 3509)—Filed July 2, 1951

Now come the defendants, William H. Black, Ruth F. Black, and William F. Black, and for answer to the complaint of intervention filed by the above-named intervenors on the 25th day of November, 1950, allege, state, and aver:

[The language which follows is identical with that set out in the answer of William H. Black to interveners' complaint of D. Arthur Walker, et al., case No. 3495, printed page 31. Signature of counsel identical with that of other answers.]

IN UNITED STATES DISTRICT COURT

ANSWER OF WILLIAM H. BLACK, ET AL. TO AMENDED COMPLAINT (No. 3509)—Filed July 9, 1951

Come now the defendants, William H. Black, Ruth F. Black, and William F. Black, and for answer to the plaintiffs' amended complaint, allege, state, and aver:

[fol. 55] First: Admit the allegations of paragraph 1 relative to the incorporation of the Black Marshall Oil Company and residency of the parties, but neither admit nor deny that each of the plaintiffs was a shareholder of the Black Marshall Oil Company at all of the times of the transactions of which they complain, and request that the plaintiffs be put on strict proof thereof.

Second: Deny the allegations of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of plaintiffs' complaint except as hereinafter expressly modified. Defendants admit only such allegations as correctly reflect the records of the Black Marshall Oil Company as actions taken by either the stockholders or directors in regularly called or constituted meetings, but specifically deny the conclusions drawn therefrom in the complaint. Defendants specifically deny that the defendant Black entered into a scheme or conspiracy with Dale G. Ives or that Ives was his agent or employee or acted as his agent.

Third: Answering paragraph 12, these defendants admit that no demand was made upon them to prosecute this action. Answering, further, defendants allege that in an ex parte action in the U. S. District Court for the Southern District of Illinois, Northern Division, entitled A. M. Amen v. Black Marshall Oil Company, et al. and numbered P-1094, upon order of that Court, D. Arthur Walker and Fred E. Windish were appointed co-receivers of the Black Marshall Oil Company. That under the provisions of 28 U. S. C. A. 754, said receivers by virtue of their order of appointment have exclusive control of all Black Marshall property. That the order of appointment cannot be attacked collaterally in this action. That the plaintiffs in their amended complaint make no allegation that demand has been made upon the receivers to prosecute this action. That absent an allegation of demand upon said receivers or the futility thereof the plaintiffs' action is not maintainable.

Fourth: Deny the allegations of paragraphs 13, 14, 15, and 16 of plaintiffs complaint.

Answering further, defendants answering herein allege that at the time of the filing of the amended complaint there was pending and is now an action in this court entitled [fol. 56] D. Arthur Walker and Fred E. Windish, co-receivers of Black-Marshall Oil Company, a corporation, v. William H. Black and Ruth F. Black, and numbered W-143. That any and all, each and every purported cause of action attempted to be asserted by the plaintiffs is now being asserted by said co-receivers. That there is no allegation of

the inadequacy of the representation of the co-receivers. That said co-receivers have the exclusive authority to assert alleged corporate causes of action and their election to commence the aforementioned action in this court abates the instant suit.

That the plaintiffs are guilty of laches in asserting this claim and that any alleged cause of action attempted to be asserted by them has long since been barred by the statute of limitations.

That this action is allegedly in the nature of a corporation derivative suit, and therefore the plaintiffs are strictly limited to assert only a cause of action in behalf of the corporation and one that inures exclusively to it. That the plaintiffs cannot be heard to here assert any alleged personal fraud action which would be maintainable only on their personal behalf.

Answering further, defendants alleged that plaintiffs cannot in an alleged derivative suit attempt to assert any personal cause of action in behalf of a group and not expressly in the corporate behalf; and, further, that this action is not a proper class action brought in behalf of a clear and definable class, but is an attempt to intermingle with a derivative action numerous alleged fraud causes of action inuring to and existing in favor of parties who do not come within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure.

Wherefore, defendants pray for judgment that the complaint of plaintiffs be dismissed with costs to the plaintiffs.

[Signature of counsel identical with that of other answers.]

[fol. 57] IN UNITED STATES DISTRICT COURT

D. ARTHUR WALKER, and FRED E. WINDISH, Co-receivers of BLACK-MARSHALL OIL COMPANY, a corporation, Plaintiffs,

v.

WILLIAM H. BLACK, and RUTH F. BLACK, Defendants.
No. W-143

COMPLAINT (No. W-143)—Filed July 14, 1950

Plaintiffs for a cause of action against defendants, and each of them, allege and state:

1. Plaintiffs, D. Arthur Walker and Fred E. Windish, are the duly appointed, qualified and acting co-receivers of Black-Marshall Oil Company, a corporation.

2. Plaintiff D. Arthur Walker, is a resident and citizen of the State of Kansas, residing at Arkansas City, Kansas.

3. Plaintiff Fred E. Windish, is a resident and citizen of the State of Illinois, residing in the city of Galesburg, Illinois.

4. Black-Marshall Oil Company is a corporation duly organized and existing under and by virtue of the laws of Illinois.

5. Defendants, William H. Black and Ruth F. Black, are each residents and citizens of the State of California, residing at La Jolla, in said state.

6. The amount in controversy in this action exceeds, exclusive of interest and costs, the sum and value of Three thousand and no/100 ($3,000.00) dollars.

7. On the 18th day of October, 1949, in a certain action then pending in the United States District Court for the Southern District of Illinois, Northern Division, entitled and styled A. M. Amen vs. Black-Marshall Oil Company, et al., Civil No. P. 1094, upon application duly made by said A. M. Amen, an order was duly made and entered by said

Court by which plaintiffs were duly appointed co-receivers of the property, rights, assets and choses in action of Black-Marshall Oil Company, and duly authorized to file, maintain and prosecute this action. Thereafter and on the 29th day of October, 1949, plaintiffs duly qualified as such co-receivers, and are now the duly appointed, qualified and acting [fol. 58] co-receivers of Black-Marshall Oil Company. A copy of said order of appointment and of the complaint in said action was filed with this Court within Ten (10) days after the entry of said order of appointment, pursuant to the provisions of Title 28, United States Code, Section 754, June 28, 1948, 62 Stat. 923.

8. Prior to the incorporation of the Black-Marshall Oil Company, defendant William H. Black, with the aid and assistance of Dale G. Ives, an attorney of many years practice in the city of Aledo, Illinois, induced and persuaded a large number of persons residing in and around said city, hereinafter sometimes referred to as parties of the second part, to form an association and to invest large sums of money therein for the purpose of acquiring and developing oil and gas properties. A written agreement was entered into between said parties of the second part and defendant William H. Black by the terms of which the association was named the Petroleum Investment Company. Said agreement further designated the defendant William H. Black as the authorized agent of the parties thereto for the purpose of transacting all business of every kind and nature under and in connection with said agreement, without interference from the other parties thereto who advanced the funds to carry on the association's exploration and development of oil and gas properties. The parties of the second part were unfamiliar with the oil and gas business and were persuaded and induced to enter into said agreement by oral representations and statements of said Black and Ives as to the ability and experience of Black in the exploration, development and enhancement in value of oil and gas properties. Said persons residing in and around Aledo, Illinois, were thus induced and persuaded to enter into said agreement because of the great faith, trust and confidence which they were led to have in Black and Ives, which Black and

Ives at all times well knew. A true copy of said agreement is attached hereto as Exhibit A and made a part hereof.

9. Pursuant to said agreement, the parties of the second part contributed substantial sums of money to be used by the defendant William H. Black for the acquisition of oil and gas leases, drilling equipment and supplies, and for the exploration and development of said oil and gas leases. [fol. 59] Such exploring and drilling operations were carried on during the latter part of 1938 and on into 1939.

10. The exploration for oil and gas under this agreement in Illinois did not prove profitable and Black and Ives, in the summer and fall of 1939, proposed to the parties of the second part that a corporation be formed to take possession of the assets of the Petroleum Investment Company, including oil and gas leases, and interests therein which had been acquired by Black for the Petroleum Investment Company, with money contributed therefor by parties of the second part thereto, in exchange for stock in the proposed corporation, and the company thus formed to acquire and develop oil and gas leases in Kansas, Oklahoma and Texas. Said Black and Ives orally represented to the parties of the second part that Black had special and particular knowledge and experience in the Kansas field and urged said parties of the second part to agree to transfer to the proposed corporation all the assets of the Petroleum Investment Company, including oil and gas leases and interests therein as above set forth. Black also undertook negotiations with one Deering J. Marshall who owned oil and gas leases and interests therein in Kansas, Texas and Oklahoma and C. E. Ranney. Managing officer and authorized agent of the Landowners Oil Association, a corporation, to induce, and did induce, said persons to transfer to the proposed corporation ownership or control of oil and gas leases and royalties in Kansas, Texas and Oklahoma in return for stock in the proposed corporation.

11. Having faith and confidence in Black and Ives, and believing in, and relying on, their statements and representations as to the desirability and benefit of forming a new corporation, said parties of the second part agreed

to join in said plan of forming a corporation, to be known as The Black Oil Company, later changed to Black-Marshall Oil Company.

12. Black and Ives then caused the Black-Marshall Oil Company to be incorporated under the laws of the State of Illinois, with authority to issue Two Hundred thousand (200,000) shares of common stock of no par value, and [fol. 60] Twenty-thousand (20,000) shares of preferred stock of a par value of Ten ($10.00) dollars per share.

13. The Black-Marshall Oil Company, hereinafter sometimes referred to as the Company, was incorporated in January of 1940, with its head office at Aledo, Illinois.

14. At a time or times unknown to plaintiffs, Black and Ives formed a plan, scheme and conspiracy, fraudulently and unlawfully, to secure and retain for themselves complete domination and control of the Company and to use the moneys, properties, shares of stock and other assets of the Company for their own use and benefit, in which plan, scheme and conspiracy the defendants Ruth F. Black, joined as hereinafter stated, and said Black and Ives did fraudulently and unlawfully secure and retain for themselves complete domination and control of the Company and have used its moneys, properties, shares of stock and other assets for their own use and benefit, and for the use and benefit of defendant Ruth F. Black, and of their minor son, William F. Black.

15. In pursuance of said plan, scheme and conspiracy, Black and Ives caused the Board of Directors, at the said Board's first meeting on the 20th day of January, 1940, to adopt a resolution directing the issuance of One Hundred twenty-two thousand five hundred (122,500) shares of common stock and nine thousand fifty-five (9,055) shares of preferred stock of the Black-Marshall Oil Company in exchange for the assignment to the Company of certain oil and gas leases, and interests therein. Black and Ives, as President and Secretary-Treasurer of the Company, then caused to be issued to Black 10,000 shares of common stock, and 1000 shares of preferred stock, and to "W. H. Black, et al.," 64,870 shares of common stock without any record

of the parties who were included in the term "W. H. Black, et al." and of which shares of common stock, 59,870 shares Black and Ives on or about January 17, 1941, caused to be issued to W. H. Black. Black had no lawful or equitable right, title or interest in or to said shares of stock so issued to him and paid no money or other thing of value for said shares of stock. There were no net profits arising from [fol. 61] the operation of the Petroleum Investment Company, and all the assets and property transferred and assigned by it to Black-Marshall Oil Company in exchange for stock were paid for by and belonged to the parties of the second part in the aforesaid agreement forming said Petroleum Investment Company. Continuously thereafter, Black pretended to be the lawful and equitable owner of said shares of stock and has appropriated and retained for himself the value, profits, rights and proceeds of said shares, all in fraud of the Company and its other shareholders.

16. In further pursuance of said plan, scheme and conspiracy, and to aid in carrying it out, Black and Ives proposed and orally persuaded the stockholders, at their first annual meeting on the 11th day of January, 1940, to adopt a set of by-laws which provided for a Board of Directors composed of five (5) members; and Executive Committee and Finance Committee composed of three (3) members each to be appointed by the Board of Directors; a President, Vice-President, Secretary-Treasurer and Assistant Secretary-Treasurer, all to be selected by the Board of Directors. The by-laws further provided that all checks, drafts, notes or other obligations of the Company should be signed by such of the officers of the Company as should be directed by the Board of Directors, that the principal office of the Company should be in the City of Aledo, Illinois, that the Board of Directors could designate the place of holding the annual stockholders meeting, either within or outside the State of Illinois, that the Directors' meetings could be held at any place either within or without the State of Illinois, that the books of the Company could be kept outside the State of Illinois, at such place as the directors should designate from time to time, and that the Board of Directors could, in the course of any business of the Com-

pany, designate any person as the agent of the Company, with such power as the Board might think fit. The by-laws further provided that the Executive Committee was authorized to execute all the powers of the Board of Directors, except such powers as might specifically be delegated to the Finance Committee, at any and all times when the Board of Directors was not in session, and that the President or [fol. 62] Chairman of the Executive Committee was authorized to exercise all the powers of the Executive Committee when the Executive Committee was not in session, and the Chairman of the Finance Committee was authorized to exercise all the powers of that Committee when it was not in session.

17. Black and Ives were elected members of the Board of Directors at the first stockholders meeting, and at all times hereinafter complained of remained members of the Board of Directors.

18. At the first meeting of the Board of Directors, Black was elected President of the Company, and at all times hereinafter complained of continued as such President. Ives was elected Secretary-Treasurer, and at all times hereinafter complained of continued to hold such office and position; Black and Ives were named as members of the Executive Committee and Finance Committee, and continued to be such members at all times hereinafter complained of; Black was named Chairman of the Executive Committee and Finance Committee, and at all times hereinafter complained of continued to be Chairman of each of said committees.

19. At all times thereafter, Black, with the aid and assistance of Ives, was in complete domination and control of the Company and all of its business, property, income, expenses, operations and assets.

20. The stockholders were induced and persuaded to adopt said by-laws and to elect Black and Ives to the Board of Directors, by reason of the trust and confidence which said stockholders had in Black and Ives, which trust and confidence the stockholders continued to hold at all times of which complaint is hereinafter made, which Black and

Ives at all times well knew. Because of such trust and confidence, the stockholders believed in, and relied on, all statements and representations made by Black and Ives, or either of them, as Black and Ives at all times well knew.

21. At the first meeting of the Board of Directors, Black and Ives persuaded and induced the Directors to designate the Fourth National Bank in Wichita, Kansas, as the depositary for all the Company's funds, to remove all Com- [fol. 63] pany funds and records from the principal office in Aledo, Illinois, to Wichita, Kansas, and thereafter to Great Bend, Kansas, where they were not readily accessible to the stockholders. Thereafter, and throughout his tenure as president and director of the Company, Black without the knowledge or consent of the stockholders, or directors, other than Black and Ives, withdrew and converted to his own use and benefit, large sums of money belonging to the Company. Said sums of money have never been repaid by Black to the Company and plaintiffs are entitled to an accounting to determine the exact amounts so converted by Black to his own use and benefit. Such misappropriation of Company funds by Black has come to the notice of the stockholders and plaintiffs only within the last few months.

22. After the books and records of the Company were removed from Aledo, Illinois, to Wichita, Kansas, Black continuously used the funds, assets and property of the Company for his own personal benefit, gain and profit and continuously and arbitrarily exploited the property and affairs of the Company and his position of domination and control thereof, for his own personal use and benefit, all without the knowledge or consent of the stockholders or directors other than Black and Ives. Such facts have only been discovered and brought to the attention of the stockholders and plaintiffs within the last few months. Plaintiffs are entitled to an accounting by Black to determine the profits, gains and benefits realized by Black as a result of the unlawful acts hereinbefore set forth.

23. Black and Ives caused to be issued or transferred to themselves, Ruth F. Black, and William F. Black, a minor.

son of William H. Black and Ruth F. Black, shares of stock in the Company to which said parties had no lawful or equitable right, title or interest and for which no consideration was paid, all without the knowledge or consent of the stockholders or directors, other than Black and Ives. Plaintiffs and the stockholders have discovered such issuance and transfer of stock only within the last few months. Plaintiffs are entitled to an accounting by said defendants to determine the exact amount of stock so issued and transferred and the value, profits or proceeds received or realized [fol. 64] by said defendants as a result of their pretended ownership of such stock.

24. Following the organization of the Company and prior to the year 1944, Black and Ives, convinced that the Company owned very valuable oil and gas properties, in pursuance of said plan, scheme and conspiracy began and carried out a plan to cause the stockholders who had contributed their money and property to the formation of the Company and the exploration and development of its properties, to become so dissatisfied with their investment in the Company that they would dispose of their stock in the Company or the assets of the company at a price far less than its true value, and thereby Black and Ives would become the substantial owners of the Company without the necessity of paying more than a fraction of its full and true value. For the purpose of carrying out such plan, scheme and conspiracy, Black and Ives initiated and carried out the policy and practice of circulating and causing to be circulated among the stockholders reports that the Company was in a financial condition to pay, and would declare and pay a substantial dividend immediately after the next annual stockholders meeting. Thereafter said Black and Ives would then state, upon various pretexts, including the statement that the Federal Government would take practically all of the proposed dividend in taxes, that a dividend could not be declared, all for the purpose of discouraging the stockholders with their investment and inducing them to sell their stock or the assets of the Company at a figure far less than the true value. Throughout the entire period during which Black and Ives caused the

stockholders to believe that a dividend was about to be paid, said Black and Ives knew that the Company could not legally, under the laws of the State of Illinois, declare and pay a dividend because the Company did not have net assets available therefor, and that the net income of the Company, although large, that its credit capacity had been used to the limit by Black for his own personal use and in exploring and developing production.

25. In further pursuance of said plan, scheme and conspiracy, Black and Ives, in the summer and fall prior to the annual stockholders meeting in January, 1944, circulated [fol. 65] and caused to be circulated among the stockholders the report that at the annual meeting of stockholders in January, 1944, and at the Directors' meeting immediately thereafter, a dividend of Two Dollars ($2.00) or Two and 50/100 ($2.50) dollars would be declared and paid on each share of stock. Thereafter, at the annual stockholders meeting held at the Country Club at Aledo, Illinois, Black and Ives orally stated to the stockholders that the Company was able to pay a Two and 50/100 ($2.50) dollar dividend, but that the Federal tax authorities had informed them that the Federal Government would take at least Seventy-five per cent (75%) of it for taxes, and that at that rate, it would take at least Fifteen (15) years for any stockholder to get back his original investment. Black and Ives further stated that the only manner in which the stockholders could get anything out of their investment was by a sale of the Company's producing properties. Thereupon, Black and Ives caused to be presented to the stockholders a resolution authorizing Black to sell the producing properties of the Company for a sum not less than was sufficient to pay at least Eight Dollars ($8.00) per share net for each share of stock outstanding in the Company but specifically reserving from said sale what was called the Landowners properties and all undeveloped leases. Believing in, and relying on, the statements made by Black and Ives, the stockholders adopted said resolution.

26. Throughout the entire period of his association with the stockholders of the Company, both prior to and after the incorporation of the Company, Black established and

consistently observed the custom and practice of utilizing Ives as his intermediary and spokesman for the purpose of communicating with, reporting to, and otherwise dealing with said stockholders, except for the infrequent occasions when Black personally reported to and communicated with said stockholders. Said stockholders consistently, openly and unequivocally recognized Ives as Black's intermediary and spokesman in matters relating to their interests as stockholders of the Company, and Black and Ives knew of, approved and fostered said relationship.

27. During the summer of 1944, Black, acting through and in conjunction with Ives, notified the stockholders that a sale of the producing properties had been made, that in [fol. 66] order to carry out the said sale it was necessary for each stockholder to turn in one-half (½) of his stock, and that each shareholder was to receive Ten ($10.00) dollars per share on his proportionate interest in the sale price. Thereafter, in the summer and fall of 1945, Black, acting through and in conjunction with Ives, orally notified the stockholders that the asserted sale of the producing properties, of which they had previously been advised, was ready to be completed, that it was necessary to complete the sale that each shareholder turn in the remaining half of his stock and that each shareholder was to receive Twelve Dollars ($12.00) per share for his remaining stock as his full allocable proportion of the balance of the selling price of the producing properties, and that each stockholder, so turning in his stock, would still retain his interest in the company, and that they should immediately turn in their remaining shares of stock and that thereafter each stockholder so turning his stock in would later be issued two shares of stock for each share so turned in. The stockholders so approached, believing in and relying on the statements made by Black and Ives, turned in their shares of stock. The statements and representations so made by Black and Ives were false and untrue at the time the same were made and at all times thereafter, as Black and Ives then well knew.

28. Black and Ives used funds belonging to the Company and funds borrowed by the Company from the National

Cooperative Refinery Association to pay the aforesaid sums to said stockholders. The stock so turned in by the aforesaid stockholders was, in part, retired on the books of the Company, and, in part transferred to Black. The pretended purchase and retirement of its stock by Black and Ives was illegal and void because the Company did not have net assets, available therefor and by reason of the fraud and deception practiced upon the said stockholders, all of said stockholders are in equity the owners of such stock and entitled as such to all of their rights and interest therein. Said stock was turned in to complete the sale of the producing properties as represented by Black and Ives and for no other purpose.

29. By pretending to cause said shares of stock to be retired on the books of the Company, Black and Ives, to-
[fol. 67] gether with the defendants Ruth F. and William F. Black, purported to own a substantial majority of the stock of the Company and could effectuate a sale of the properties by the formality of a sale of stock and a contemporaneous dissolution of the Company, thus avoiding the Federal Tax on a sale of assets.

30. Thereafter and in pursuance of said plan, scheme and conspiracy, Black, Ives, and Ruth F. Black, and by the use of the stock standing in the name of William F. Black, in 1947, sold the producing properties of the Company to the National Cooperative Refinery Association for the sum of Seven Million, Five Hundred Thousand Dollars ($7,500,000.00). By the terms of such sale, there was transferred to the said Association, Sixty-five thousand one hundred and twenty-six (65,126) shares of stock, constituting seventy-six per cent (76%) of the outstanding stock of the Company, as shown by the stock record which was controlled, manipulated and changed by Black and Ives as they desired. Black, purported to be the owner of Sixty-two Thousand, One Hundred twenty-six (62,126) of said shares, unlawfully and fraudulently acquired by Black as hereinbefore set out, received therefor the sum of Fifty-one and 6/100 ($51.06) dollars per share. As a part of the agreement of sale, there was a side agreement (whether oral or written, plaintiffs do not know) by the terms of which Black and Ives agreed

to effect a dissolution of the Company and said Black and Ives did thereafter attempt to dissolve the Company. Said attempted dissolution has since been declared illegal, invalid and void and has been set aside.

31. The National Cooperative Refinery Association, by the terms of said sale, agreed to purchase the additional stock not transferred to it as aforesaid, and immediately after the sale of the properties as above described, said Association paid to each remaining Shareholder the sum of Fifty-one and 6/100 ($51.06) Dollars per share. Such sale was in substance and in entirety a sale of the producing properties of the Company and took the form of a transfer of stock as an incident of the scheme and device to avoid the Federal tax on a sale of the properties.

32. The said sum of Seven Million, Five Hundred Thou-
[fol. 68] sand dollars ($7,500,000.00) paid by the National Cooperative Refinery Association was in truth and in fact paid for the producing properties of the Company acquired by said Association, and said sum was the property of, and belonged to said Company, and was a part of its assets in which all stockholders were entitled to share ratably on distribution.

33. By the terms of said agreement with the National Cooperative Refinery Association, there was reserved to Black and his nominees all personal property belonging to the Company, except such as was used in and about producing wells and Black and his nominees were to receive all of the Landowners' leases and properties and all non-producing acreage, the National Cooperative Refinery Association acquiring only sixteen (16) producing properties. Thereafter, Black pretended to purchase the above described properties from the Company but paid no consideration or a grossly inadequate consideration therefor, and whatever sum, if any, was paid by him was with funds belonging to the Company which he had unlawfully taken from the Company and received and unlawfully and inequitably retained, and said properties purportedly purchased by Black are held in trust for the Company and its stockholders.

34. Defendant Ruth F. Black, with William F. Black, as the pretended owners of Six Thousand, Eight Hundred and Four and 5/100 (6,804.05) shares of stock, in the Company, unlawfully acquired as hereinbefore described, joined with Black and Ives and used said shares of stock in carrying out said plan, scheme and conspiracy in selling said property to the National Cooperative Refinery Association, and in the attempted dissolution of the company, received and unlawfully and inequitably retained Fifty-one and 6/100 ($51.06) dollars per share. Said sums of money are the property of the Company and are held in trust by said defendants for the Company and its stockholders.

35. Defendant William H. Black caused to be distributed to certain favored shareholders of the Company, in addition to himself and the defendant Ruth F. Black and William F. Black, and not including any of the shareholders previously defrauded of their stock as hereinbefore alleged, [fol. 69] Fifty-one and 6/100 ($51.06) dollars per share of stock as their distributive proportion of the said Seven Million, Five Hundred thousand dollars ($7,500,000.00). Said distribution was greatly in excess of the proper distributive rights and interests of said favored shareholders, which the defendant William H. Black well knew, and said defendant is liable to the Company for said excess sums so distributed.

36. None of the stockholders who turned in their stock in 1944 and 1945 as above set forth, knew or had any notice or knowledge of the false and fraudulent nature of the statements and representations made by Black and Ives, as heretofore set forth, or of the real facts of the sale to the National Cooperative Refinery Association, until May of 1949.

Wherefore, plaintiffs pray:

(a) That defendant William H. Black be required to account for all funds, property, or other assets of the Black-Marshall Oil Company converted by said defendant to his own use and benefit;

(b) That the right, title and interest of the defendants William H. Black and Ruth F. Black, and of William F. Black in the shares of stock purportedly held by them, be

adjudged and determined and that said defendants be required to account to the plaintiffs for all gains, profits and proceeds realized from said shares of stock wrongfully and unlawfully held by them;

(c) That all stock turned in by stockholders in 1944 and 1945, in reliance on the fraudulent representations and statements of Black and Ives be restored to its original status, and that such stockholders be declared to be equitably entitled to the ownership thereof, and all the rights, privileges and benefits thereof;

(d) That the defendants and each of them be required to account for all gains, profits, or proceeds realized by said defendants as a result of the unlawful transactions described above;

(e) That the plaintiffs have and recover of the defendants William H. Black and Ruth F. Black the sum of Seven [fol. 70] Million Five Hundred Thousand dollars ($7,500,000.00) less any part thereof which has been ratably and properly paid to shareholders of the Company according to their rights and interest in said sum;

(f) That the plaintiffs have and recover of and from the defendant William H. Black all of the Landowners' property owned by the Black-Marshall Oil Company, all undeveloped acreage belonging to the Black-Marshall Oil Company as of the date of the sale to the National Cooperative Refinery Association, and all other property of the Black-Marshall Oil Company acquired by said defendant or his nominee in connection with said sale to the National Cooperative Refinery Association, or the fair and reasonable value thereof;

(g) That the plaintiffs may have and recover all other relief, at law and in equity, to which they are entitled under the facts.

[Same counsel as in case No. 3495.]

Filed with exhibit A, July 14, 1950.

EXHIBIT A—FORM OF AGREEMENT

This agreement made and entered into by and between W. H. Black, party of the first part and the undersigned parties of the second part; Witnesseth:

That whereas the undersigned parties are desirous of forming an association for the purpose of leasing and blocking, purchasing oil leases, to own, hold and mine lands supposed to contain oil or gas or other minerals and to bore, drill, sink, and search for oil, to purchase or lease wells and oil bearing lands and to sell, ship, pipe and refine the oil produced from such wells and to do all things necessary in the ownership and disposal of oil wells and oil products;

And whereas the party of the first part is familiar and acquainted with the general oil business and its working; [fol. 71] And whereas the parties of the second part are desirous of entering into an agreement with the party of the first part to act, as and for, said association in leasing, blocking, the purchase of oil leases, to bore, drill and search for oil and do all things necessary in connection with the production of oil and the disposition of the same and the purchase of all equipment necessary in the production and transportation of oil and its products.

Now therefore it is mutually agreed by and between the parties hereto, that in consideration of his services rendered and to be rendered herein said party of the first part is to receive 25% of all net profits derived from the sale of any oil lands, leases, oil or other products derived from lands purchased or leased under this agreement, or in any propositions covered by this agreement.

It is further mutually agreed by and between the parties hereto, that all parties of the second part shall share prorata in 75% of the net profits arising under its agreement; said parties of the second part to each receive the proportion of profits which their investment bears to the whole sum invested by all parties of the second part.

It is further mutually agreed by and between the parties hereto that the party of the first part may invest money in said association and have the same benefit for the use of said money as the parties of the second part.

It is further mutually agreed by and between the parties hereto, that the party of the first part shall be the authorized agent of the parties of the second part, to transact all business of every kind and nature under and in connection with said agreement without interference from any parties of the second part.

It is further agreed that this association shall be known as The Petroleum Investment Company.

It is further mutually agreed by and between the parties hereto that the parties of the second part shall pay their contributions in this enterprise to the party of the first part, and the receipt by the party of the first part shall be all the necessary evidence of their interest in the association. [fol. 72] In Witness Whereof we have hereunto set our hands and seals.

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Party of the first part.

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Parties of the second part.

IN UNITED STATES DISTRICT COURT

ANSWER (No. W-143)—Filed October 14, 1950.

Come now the defendants above named, and for answer to the plaintiffs' petition, and

First: Admits the appointment of the plaintiffs but neither admit nor deny that their appointment was legal, and request that the plaintiffs be put on strict proof thereof.

Second: Admit the allegations of paragraphs 2, 3, 4, 5, and 6 of said complaint.

Third: That they have no knowledge of the allegations of paragraph 7 and request that plaintiffs be put on strict proof thereof.

Fourth: Answering the allegations of paragraphs 8, 9, 10, 11, 12, and 13 of said complaint, these answering defendants admit:

(a) That the Black-Marshall Oil Company was incorporated in 1940 under the laws of Illinois, with its principal place of business at Aledo, Illinois.

(b) That said corporation had authority to issue 200,000 shares of common stock of no par value and 20,000 shares of preferred stock of a par value of $10.00 per share.

(c) That a number—but not all—of those who had been interested in a venture for exploration and development of [fol. 73] oil and gas properties carried on as the Petroleum Investment Company became stockholders in the Black-Marshall Oil Company.

(d) That said venture did not prove profitable and that all of the investors therein suffered a loss of their investment.

(e) That defendant William H. Black undertook negotiations with Deering J. Marshall and C. E. Ranney for the transfer of certain properties which they owned or controlled for stock in the Black-Marshall Oil Company.

Concerning said paragraphs 8 to 13, both inclusive, of said complaint, the defendants deny each and all of the other allegations therein contained and request that plaintiffs be put on strict proof thereof.

Fifth: These answering defendants deny the allegations of paragraph 14 of said complaint.

Sixth: Answering paragraph 15 of said complaint, defendants deny each of the conclusions therein, admitting, however, the transfer of stock to William H. Black, and in connection therewith allege that said stock was issued in return for the transfer to the Black-Marshall Oil Company of valuable oil and gas leasehold estates which were at all times held, retained, and developed by the Black-Marshall Oil Company and out of which said company realized very substantial profits.

Seventh: Answering paragraphs 16, 17, 18, 19, and 20 of said complaint, the defendants admit the allegations of fact contained therein so far as they correctly reflect the records of the Black-Marshall Oil Company as actions taken by either the stockholders or directors in regularly called or constituted meetings, but deny the conclusions drawn therefrom and alleged in said paragraphs of said complaint.

Eighth: Answering paragraph 21 of said complaint, defendants admit that the corporate records and funds were removed from Aledo, Illinois to Wichita, Kansas, and there-

after to Great Bend, Kansas, allege that the purpose thereof was to keep said records and funds where the company was actively operating. Defendant William H. Black spe- [fol. 74] cifically denies the latter part of said paragraph 21, and request that the plaintiffs be put on strict proof thereof.

Ninth: Answering paragraph 22 of said complaint, the defendants deny each allegation therein.

Tenth: Answering paragraph 23 of said complaint defendants deny each allegation therein and specifically allege that Ruth F. Black and William H. Black paid full value for all stock acquired by either of them.

Eleventh: Answering paragraphs 24, 25 and 26 of said complaint, defendant William H. Black:

(a) Denies that he entered into a scheme or conspiracy with Dale G. Ives as alleged therein;

(b) That he circulated or caused to be circulated a report that the corporation would pay a dividend;

(c) That Dale G. Ives was his agent or employee or acted as his spokesman.

Twelfth: Answering paragraph 27 of said complaint the defendants deny each allegation therein contained.

Thirteenth: Answering paragraph 28 of said complaint, defendants admit that certain stock purchased from certain stockholders was acquired with funds borrowed from the National Cooperative Refinery Association, and allege in connection therewith that a substantial portion of said stock was retired upon the books of the company. Except as admitted, defendants deny each other allegation of said paragraph 28 and request that plaintiffs be put on strict proof thereof.

Fourteenth: Answering paragraph 29, defendants deny each allegation of fact therein contained.

Fifteenth: Answering paragraph 30 of said complaint, defendants:

(a) Deny that producing properties were sold to the National Cooperative Refinery Association, and allege that stock belonging to individual stockholders were sold upon the basis of $7,500,000.00;

(b) Admit the transfer to said Association of 65,126 shares of stock;

[fol. 75] (c) Admit the receipt of $51.06 per share on the stock owned by these answering defendants;

(d) Admit on information and belief that some ex parte action was taken by the plaintiffs or certain stockholders to declare the dissolution invalid, but allege that such action, if any, was illegal, void, and of no force and effect.

Sixteenth: On information and belief, admits the first sentence of paragraph 31 of said complaint, but denies that such sale was a sale of producing properties, and allege that the sale made by these answering defendants was of stock and not of property.

Seventeenth: Answering paragraph 32, these answering defendants deny each allegation therein contained.

Eighteenth: Answering paragraph 33 of said complaint, defendants deny each allegation therein contained except that this answering defendant William H. Black purchased certain property belonging to the Black-Marshall Oil Company and paid the full value and consideration therefor.

Nineteenth: Answering paragraphs 34 and 35 of said complaint, defendants deny each allegation therein contained except such as have been heretofore admitted by this answer.

Twentieth: Answering paragraph 36, defendants deny the allegations therein and ask that plaintiffs be put on strict proof thereof.

Twenty-first: For further answer, defendants allege that any pretended cause of action of plaintiffs has long since been barred by the statute of limitations of the State of Kansas and by laches on the part of both the plaintiffs and the stockholders of Black-Marshall Oil Company who may have heretofore asserted any claim against these defendants, or either of them, or who may hereafter attempt to set up or assert any claim.

Wherefore, having fully answered, defendants pray that they may go hence without day and have judgment for their costs.

[Signed by George Siefkin, Attorney for Defendants.]

[fol. 76] IN UNITED STATES DISTRICT COURT

MOTION TO REQUIRE PLAINTIFFS TO ELECT (No. W-143)—Filed March 13, 1952

Come now the defendants, W. H. Black and Ruth F. Black, and move the Court for an order requiring the plaintiffs above named to elect upon which of the complaints filed herein they will proceed to trial.

As a basis therefor, these moving defendants state that the above case was filed as the original action by the plaintiffs and that thereafter the plaintiffs above named intervened in causes Nos. 3495 and 3509 pending in this Court, filing therein an intervening petition which while adopting certain of the allegations of the complaints filed in said causes, reiterated in detail, and, in some instances, verbatim, the allegations of the complaint filed in this cause.

That the filing of three substantially identical pleadings seeking the same relief is not only confusing but may require the assertion of different defenses on the part of these defendants; and that until the plaintiffs are compelled to elect, it will be difficult, if not impossible, to determine which complaint or intervening petition must be defended against and what defenses are available thereto and what evidence may be admissible thereunder.

Wherefore, defendants pray for an order of this Court directing the plaintiffs herein to elect upon which pleading they intend to proceed herein on trial.

[Signed by George Siefkin, Attorney for Defendant.]

IN UNITED STATES DISTRICT COURT

CLERK'S NOTE

[Plaintiffs' requested findings of fact and conclusions of law in case No. 3495, filed January 2, 1953, are identical with plaintiffs' substituted findings of fact and conclusions of law filed June 19, 1953, and printed at pages 93 to 115, with the exception that references to record citations do not ap-

pear in plaintiffs' requested findings of fact in case No. 3495, filed January 2, 1953.]

[fol. 77] IN UNITED STATES DISTRICT COURT

DEFENDANTS' REQUESTED FINDINGS OF FACT (ALL CASES)—Filed June 16, 1953.

I.

No. 3495 was begun by the filing of a complaint by Mr. Amen on June 28, 1949. The original defendants named were Black-Marshall Oil Co., a corporation; National Co-operative Refinery Association, a corporation; Landowners Oil Association, a corporation; William H. Black; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. At the plaintiff's motion the action was dismissed as to National Cooperative Refinery Association, a corporation; Leon Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. Sherrard later became an intervening plaintiff. An amended complaint was filed on July 25, 1950. Intervening complaints were filed by the following plaintiffs on the dates stated: On July 25, 1950, Baldwin, Fred Brown, Ogle, William Brown, Clark, Danford, Elving, Edith Hall, Hays Hall, McBride, Nelson, E. W. Robinson, L. E. Robinson, Dr. Rogers, Runbom, Riley, Stephens, Stites and Wadleigh; on February 10, 1951, Constant, Ets Hokin, Sherrard and Stevenson, Lundblad and Jones.

The number of shares in controvery for the original and intervening plaintiffs are as follows:

Amen	100	Edith Hall	2900	Dr. Robinson	3650
Baldwin	100	Hays Hall	4200	Dr. Rogers	3550
Fred Brown	500	Jones	500	Runbom	500
Wm. Brown	400	Lundblad	2300	Sherrard	6983
Clark	365	McBride	500	Stephens	1200
Constant	1850	Nelson	1000	Stevenson	1250
Danford	3875	Ogle	325	Stites	1525
Elving	440	Riley	1000	Wadleigh	3000
Ets Hokin	450	Robinson	1000		

Ex. V, D. 437; Ex. 97-102, D. 380.

All these shares were sold in 1944 and 1945 through Dale Ives. D. 6-8; D. 15, 16; D. 23; D. 29, 30; D. 33, 34; D. 38, 39; D. 42, 43; D. 48, 49; D. 52, 53; D. 59, 60; D. 66; D. 66, 67; D. 68; D. 69; D. 74; D. 79, Ex. O, P, D. 434; D. 83; D. 87, 88; [fol. 78] D. 92, 93; D. 96, 97; D. 103; D. 106; D. 159; D. 164; D. 168; Ex. V, D. 437; Ex. 97-102, D. 380.

This controversy concerns whether these original and intervening plaintiffs remained the equitable owners of the shares of stock set opposite their names hereinabove or whether they were entitled to recover from the defendants any sums in addition to the funds received at the time of the sale through Ives in 1944 and 1945.

This action was tried as a result of a consolidation with No. 3509 and No. W-143 during the trial of No. W-143. (T. 1539).

II.

On June 28, 1949, Amen, Wadleigh, Danford, Dr. Robinson, Hays Hall and Riley filed action No. 3509. The original defendants named were Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; National Cooperative Refinery Association, a corporation; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund; Cecil C. Anderson; Gladys M. Anderson; Lottie H. Anderson; Walter H. Beech; Howard S. Bryant; Fayette B. Dow; Walter G. English; Frank Fritts; Mary G. Fritts; Jas. H. Graham; Edith Hahn; Jesse S. Montgomery; Ruth Kellogg Orr; H. O. Peet & Co., a corporation; Edward Roos; Smith, et al., trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Smith, Anna Byron Waud, Emily Birnie Smith.

At the plaintiff's motion the action was dismissed as to all defendants except Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black. Later Berglund became an intervening plaintiff. On July 25, 1950, Bowers, McBride, Nelson, Stites, Baldwin, Berglund, Dr. Rogers, Bunbom, Fred Brown, William Brown, Edith Hall, Ogle, Clark, Elving, Stephens and Mr. Robinson filed intervening complaints in No. 3509, and on February 10, 1951, Constant intervened in No. 3509.

The number of shares in controversy held by the different original plaintiffs and intervening plaintiffs are as follows:

[fol. 79]

Amen	100	Danford	3875	Robinson	1000
Baldwin	100	Elving	440	Dr. Robinson	3650
Berglund	3483	Edith Hall	2900	Dr. Rogers	3550
Bowers	250	Hays Hall	4200	Runbom	500
Fred Brown	500	McBride	500	Stites	1525
Wm. Brown	400	Nelson	1000	Wadleigh	3000
Clark	365	Ogle	325		
Constant	1850	Riley	1000		

Ex. V, D. 437; Ex. 97-102, D. 380.

This case was in all respects similar to No. 3495 except for the difference in the original plaintiffs and the intervening plaintiffs. The cause was consolidated for trial with No. 3495 and No. W-143 during the trial of No. W-143. (T. 1539).

III.

Co-receivers D. Arthur Walker and Fred Windish were appointed for the Black-Marshall Oil Company by the United States District Court for the Southern District of Illinois in Civil Action P-1094. J. K. Stevenson, J. R. Sherrard and Spencer I. Berglund were defendants in this action and later became intervening plaintiffs in either 3495 or 3509. Ex. 1, D. 362. These co-receivers filed case No. W-143 on July 14, 1950. Subsequently the co-receivers filed an intervening petition in No. 3495 on September 25, 1950, and in No. 3509 on November 25, 1950. Such receivers were appointed in an action brought in the Southern District of Illinois by some of the plaintiffs in No. 3495 and No. 3509. Trial was had of this cause brought by the co-receivers during which cases Nos. 3495 and 3509 were consolidated with it. (T. 1539). At the close of all the plaintiffs' evidence, the co-receivers elected to rely on their complaint in No. W-143. D. 168. The action of the co-receivers is to redress wrongs allegedly committed by the defendants to the corporation, Black-Marshall Oil Company.

IV.

The Petroleum Investment Company was formed in Illinois in late 1938 as a partnership association, joint adventure, syndicate or group of individuals, being, in addition to Black and Ives, Berglund, Hazel Constant, Danford, Edith [fol. 80] Hall, Hays Hall, the Lundblad sisters, Dr. Robinson, Dr. Rogers, Sherrard, Stevenson, Stites and Wadleigh. Many of these individuals signed Petroleum Investment Company agreements with Black. Most of the investors in each instance invested in the company through Dale Ives who was their leader and spokesman. The Petroleum Investment Company invested about $21,000.00 in leases and the development of leases but was not successful and by early 1939 had exhausted its funds in drilling nine dry holes in Illinois and Indiana. D. 2, 3, 10; D. 12, 13, 17; D. 21, 22, 24, 25; D. 35, 36, 37; Ex. F, D. 425, 426, 427; D. 41, 42, 44; D. 45, 46; D. 56, 57; D. 70, 71, 72, 75; D. 77, 78, 80; D. 98, 99, 102; D. 157; D. 162; D. 104, 105, 107, 108, 109-114, 136; D. 237, 267, 271, 272, 347; Ex. 4, D. 363; Ex. 14, D. 365; Ex. 54 and Ex. 55, D. 371; D. 307; D. 274; D. 347.

V.

In the early spring of 1939 Black left Illinois to meet Marshall in Tulsa, Oklahoma. After an automobile accident in which Black received injuries which necessitated his hospitalization, he met Marshall in Tulsa and formed a partnership with Marshall for the acquisition and development of leases in Kansas. D. 237. In June or July, the partnership, consisting of Black and Marshall, acquired the Esfeld lease as a farmout from Sohio Oil Company and made a deal with Bennett, Bronson & Murmos to drill a well on the Esfeld lease which well came in as a producer in July of 1939 and was equipped by the partnership. D. 238, 239, 272-275. Thereafter and prior to the incorporation of Black-Marshall, the partnership acquired four other leases in Kansas, the Weber, the Dolechek, the Hoffman and the Krier. D. 238; D. 222; Ex. Y-3, D. 552; D. 205; D. 198-200. Beginning in late August or the early fall of 1939, Black received funds from Ives and others of the Petroleum Investment group to assist the partnership in acquiring and equipping leases and

as of December 7, 1939, had received $17,650 from such group and had spent on the Kansas leases $28,415. D. 238, 239, 275, 276; Ex. 10, D. 364; D. 278-281, 347. Subsequently and before incorporation, both Black and the Illinois investors put more money into the venture. D. 240, 241, 275, 276, 347, 348; D. 353, 354; Ex. W-3, D. 551; D. 280-281.

[fol. 81] VI.

(A) The Black-Marshall Oil Company was incorporated on January 3, 1940, with an authorized capital of 20,000 shares of six per cent cumulative preferred stock at a par value of $10 and 200,000 shares of no par value common stock; a total of 9055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five Kansas leases, the Dolechek, Esfeld, Hoffman, Krier and Weber, and the corporation assumed an indebtedness of $8,827.93 against such leases. D. 281; D. 242. The common stock was issued on the basis of $1 per share. D. 242; Ex. R, D. 435; Ex. Y through Ex. E-1, D. 438 to 41. The Petroleum Investment Company investors were issued stock on the basis of one share of common for each $2 invested, including all money invested in the dry holes in Illinois, and one share of preferred for each $4 invested. D. 10; D. 13; D. 22; D. 36, 37; D. 42; D. 46; D. 57; D. 71, 72; D. 78, 80; D. 98, 99; D. 157; D. 112, 113; D. 136. Ives allocated the original issue of stock to each of the investors in the Petroleum Investment Company. D. 200; D. 213; Ex. X, D. 438; D. 263, 264. There was also authorized the issuance of 2,000 shares of preferred and 20,000 shares of common to be exchanged for 33,856.8 shares of the capital stock of the Landowners Oil Association. Ex. R, D. 435; Ex. Y through Ex. E-1, D. 438 to 441. Black became chairman of the board of directors and president of the corporation at its inception and continued in such offices throughout the existence of the corporation. D. 290. Ives became a director and secretary-treasurer of the corporation and continued in such offices throughout the existence of the corporation. D. 105. Berglund was elected a director in 1941 and served until he moved to Florida in September 1944. D. 72, 76. Dr. Robinson was elected a director at the 1941 stockholders meeting but was called to the Service and never served as a director for any real

period of time. D. 23. Sherrard was elected a director at the 1941 stockholders meeting held in January in Aledo and served and remained as a director until September 1945. D. 58, 62-64. Stevenson was elected a director at the inception of Black-Marshall but only came to Kansas once but was re-elected a director through 1944. Minute Book, Pg. 74 through 86; D. 160; D. 126. Black and Mar-
[fol. 82] shall were issued 10,000 shares common and 1,000 shares preferred, individually, and were issued 64,870 shares which were carried on the books as Black, et al., for the partnership interest of Black and Marshall in the original five Kansas leases. D. 349, 286, 287; D. 205; Ex. 97-102, D. 380; D. 198-200; D. 259.

(B) After incorporation and throughout the history of the corporation to September 1945, Black received many requests, demands and incessant overtures for dividends, loans, money for stock from the Aledo group of stockholders. Ex. P-1, D. 528; H-2, D. 536; Ex. R-2, D. 540; Ex. P-2, D. 540; Q-2, D. 540; S-2, D. 540; T-2, D. 541; Ex. X-2, D. 542; F-3, D. 545; Ex. 123, D. 386; Ex. G-3, D. 545; Ex. 122, D. 386; Ex. 121, D. 386; D. 222, 223; Ex. 27, D. 368; D. 288; D. 294; D. 298; D. 305-307; Ex. 86, D. 378; D. 311; Ex. C-3, D. 544; Ex. O-2, D. 539; Ex. K-2, D. 537; Ex. Q-1, D. 528.

VII.

In the spring or early summer of 1944, many attempts were made to sell the stock in Black-Marshall Oil Company or the assets of Black-Marshall Oil Company to realize $10 a share to each stockholder. The NCRA was among the prospective purchasers but the contemplated sale to the NCRA fell through in May of 1944 and no sale could be made of Black-Marshall stock or assets to realize $10 a share for each stockholder. D. 249; D. 301; D. 250; D. 226-231; Ex. 344, 345, D. 414. During 1944, Dale Ives made misrepresentations to many Aledo stockholders:

In the summer of 1944 Ives told Berglund that the producing properties of Black-Marshall had been sold and that Berglund should turn in half his shares; that there would be an assessment of so much a share in case of starting up later on. D. 74.

In the summer of 1944 Ives told Fred Brown that Black had made a deal with Kansas City Coop. and that it would be necessary for the stockholders to turn in half their shares to show the purchasers that they were behind Mr. Black in the deal and that the Landowners and undeveloped leases would not be sold. D. 92.

[fol. 83] Ives told William Brown in 1944 that Black had completed a deal to sell the producing wells of Black-Marshall and that the stockholders should turn in half their stock to show good faith in the deal; that the Landowners and undeveloped leases were being retained D. 96.

In the summer of 1944 Ives told Clark that he would like for him to surrender half his Black-Marshall shares since the producing properties had been sold and half the stock was needed to show good faith and bind the sale but that the undeveloped properties would be retained and after two years each of the stockholders would receive his proportionate interest in such undeveloped properties. D. 33.

In June of 1944 Ives told Mrs. Constant that she should bring in half the shares she and her husband held since the producing properties were being sold and the Landowners and undeveloped properties retained; that Black needed half the shares in order to show good faith and that 51% of the shares were behind the deal. D. 79.

Ives told Danford in June of 1944 that a deal had been made where the stockholders would receive $10 a share for the first half of their stock and more for the second half of their stock; that the undeveloped properties and Landowners would be retained but that Black had to have 51% of the shares to bind the sale. D. 6.

In the summer of 1944 Ives told Hays Hall that Black had made a deal with the Coop. and sold the producing properties of Black-Marshall and had retained the undeveloped properties and Landowners which after two years would form the nucleus of a new corporation and each stockholder would get the same proportionate shares as they had held in Black-Marshall; that at least half the stock was needed to show good faith. D. 38.

In July or August of 1944 Ives told his secretary, Myrtle Lundblad, that Black had made a deal and was selling the producing wells of Black-Marshall and retaining the unde-

veloped properties and Landowners; that the stockholders should send in half their stock so that Black could make the deal. D. 163, 164.

In June of 1944 Ives told Riley that Black had made a sale [fol. 84] of the producing properties and had to have possession of at least 51% of the stock in order to show good faith; that the undeveloped leases and landowners were being retained; that the first half would be at $10 and the second half would be called for later and would bring more money. D. 52.

In the summer of 1944 Ives told Mr. Robinson that there were prospects of a sale of the Black-Marshall Company or its shares; that half the shares had to be put up to show good faith; that the purchaser had an option on buying the company or the producing wells and that the entire stock would eventually be sold. D. 29, 31.

Ives told Dr. Robinson about Easter time in 1944 that Black-Marshall was going to be sold and that Dr. Robinson should leave his shares with Ives. D. 26.

In the summer of 1944 Ives wrote Dr. Rogers that Black was on a deal to sell Black-Marshall and that he needed her shares in order to show good faith in the deal; and told her that the shares would become worthless if she did not turn them in since the sale was going through. D. 42.

In May of 1944 Ives told Runbom to bring in his stock and Runbom did and asked that when it was reissued it be issued jointly in both his and his wife's names. D. 87-89; Ex. H-1, H-2, H-3, D. 441.

In the summer of 1944 Ives told Sherrard that a deal had been made whereby the stockholders would receive $10 a share for the first half of their stock and probably more for the remaining half; that the sale was of the producing properties; that the undeveloped leases and Landowners were being retained. D. 59.

In June of 1944 Ives told Stephens that the producing properties of Black-Marshall had been sold and that Ives was collecting half the stock in order to bind the deal but that the Landowners and non-producing properties were being held. D. 83.

Ives told Stevenson in 1944 that a sale had been made of Black-Marshall and in order to complete the sale the stock-

holders had to turn in half their stock at $10 a share. D. 159, 161; Ex. 347, D. 414.

[fol. 85] In June of 1944 Ives told Dr. Wadleigh that a deal was being made to sell Black-Marshall; that Wadleigh should turn in half his stock since 51% of the stock was needed to show a bona fide deal. D. 15, 18.

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. D. 296; D. 350; D. 250; Ex. 121, 122, 123, D. 386; Ex. F-3, G-3, D. 545; Ex. 124, D. 387; Ex. E, D. 423.

Ives obtained approximately half the shares held by all the plaintiffs in actions Nos. 3495 and 3509 which he sent in to the Black-Marshall Company or to Bill Black, and distributed to the same stockholders $10 a share for their stock so turned in. Of the shares so turned in, 25,000 were sold to Roos, Gill and Kincade. D. 297, 301, 294; 11,714 were sold to Black and the remainder were paid for by Black-Marshall itself, retained by Black-Marshall and subsequently retired. D. 260; D. 302-303; D. 316-318; D. 250; Ex. 266, D. 402; Ex. V, D. 437.

VIII.

In 1945 further attempts were made to sell the Black-Marshall Oil Company or its stock to various purchasers for an amount to net each shareholder $12 a share. No purchaser was found who would pay an amount to net each shareholder $12 a share for the stock outstanding in Black-Marshall and a contemplated sale to the NCRA fell through in September 1945. D. 251; D. 226-231. In 1945 Ives made certain misrepresentations to various stockholders:

He sent a wire to Berglund in Florida on August 29, 1945, advising that the producing properties in Black-Marshall were sold for $12 a share and the Landowners Oil Company retained; that Berglund should send his stock in blank to the Fourth National Bank in Wichita and close the deal by September 1. D. 74; Ex. 81, D. 376.

In July or August of 1945 Ives told Fred Brown that the deal with the Kansas City Coop. had gone through and it was necessary to turn in the remaining half of the stock and that after two years the stockholders would develop the undeveloped properties and Landowners which

were retained and that the Black-Marshall stock would bring $12 a share. D. 93.

[fol. 86] In the summer of 1945 Ives told William Brown that the deal was completed and that he should turn in the remainder of his stock; that the producing wells of Black-Marshall were being sold and the undeveloped leases and Landowners retained. D. 97.

In the latter part of August 1945, Ives told Clark to bring in his remaining shares; that the undeveloped properties were being retained; that the producing properties were sold and that after two years such undeveloped properties would be returned to the stockholders and each would receive the same proportionate amount as held in Black-Marshall. D. 34.

Ives wrote Black-Marshall relative to the sale of the Constant stock on September 17 and on September 20, 1945. Ex. O and Ex. P, D. 434.

About August of 1945 Ives told Danford that the sale of Black-Marshall was completed and that the rest of the stock should be turned in for $12 a share and that the Landowners and undeveloped acreage would be retained and held for two years because of tax matters or for legal reasons and would form the nucleus of a new corporation but that for two years the personnel of Black-Marshall had to work with the purchaser, the Kansas City Coop. D. 8.

Late in the summer of 1945 Ives told Hays Hall that the deal mentioned in 1944 was completed; that the stock should be turned in and he would receive $12 a share. D. 39.

In October of 1945 Ives told his secretary, Miss Lundblad, she should turn in the second half of her stock and would receive $12 a share but that the stockholders would have more money coming since the Landowners and undeveloped properties would be divided among them, but not for two years, because of taxes. D. 164.

In August of 1945, Ives told Riley that the Black-Marshall sale was complete and the stockholders would receive $12 a share; that the undeveloped leases and Landowners were retained and would be returned as the nucleus for a new company in which the stockholders would receive the same proportionate ownership as they had held in Black-Marshall but that for two years the personnel of Black-Marshall

[fol. 87] would work for the purchaser, the Kansas City Coop. D. 53.

In the late summer or early fall of 1945 Ives told Mr. Robinson that the Black-Marshall deal had gone through, that there was a buyer who was going to take up the option on all the developed properties and close the deal for the sale of the stock which should be sent in; that a new company would get started after two years to operate the Landowners, that the purchaser would not permit the operation of the Landowners or other leases for two years. D. 30.

Ives told Dr. Robinson in September of 1945 that Black-Marshall had been sold but that the stockholders would be in the oil business again in a new company on the same pro rata basis as held in Black-Marshall, soon. D. 24.

In the summer of 1945 Ives wrote Dr. Rogers to send in her remaining shares of Black-Marshall stock. D. 42.

In 1945 Ives told Sherrard that the balance of the stock should be turned in and would bring $12 a share but that the Black-Marshall sale did not include all the assets of Black-Marshall since the undeveloped properties and Landowners were being retained but would not come back to the stockholders for two years and that after such period they could make plans for development of such properties. D. 60.

In the summer or early fall of 1945 Ives told Stephens that Black was making a final deal on selling the producing properties of Black-Marshall but was retaining Landowners and the undeveloped properties for two years; that a side deal was being made whereby the Landowners and undeveloped properties would come back after two years but were held up for such period for tax purposes. D. 83.

In August of 1945 Ives told Stevenson that his remaining shares in Black-Marshall should be surrendered and that he and the other stockholders would be reissued the same amount of stock in the Landowners Company as they had held in Black-Marshall but not until after legal technicalities were ironed out would the reorganization take place. D. 159. Ex. 346, D. 414.

In the summer of 1945 Ives told Mrs. Stites that Black [fol. 88] needed the rest of the stock to complete the sale of Black-Marshall and that a new company would be formed and the stockholders would have two shares for one

on the shares held in the Black-Marshall but not until after two years. D. 49.

In 1945 Ives told Wadleigh that Black-Marshall was sold and that Ives had to have the rest of his shares. D. 19.

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. D. 310, 311, 320, 321, 307; Ex. O, P, D. 434; Ex. 27, D. 368; Ex. 12, D. 364; Ex. 86, D. 378.

Ives obtained the balance of the stock held by the plaintiffs in Nos. 3495 and 3509 and delivered such stock to the Black-Marshall Oil Company or Black. The Black-Marshall Oil Company paid each one of the plaintiffs for such shares at the rate of $12 a share. D. 263; Ex. V, D. 437.

In September of 1945 a loan agreement was negotiated between Black-Marshall and the NCRA which was reduced to writing on October 1, 1945, whereby the NCRA loaned $3,200,000 to Black-Marshall and Black-Marshall obligated itself to drill 12 producing wells each year for which the NCRA would loan an additional $22,000 for each producing well so drilled. D. 252; D. 312; Ex. 95, D. 379. The NCRA was conversant with the purchase by Black-Marshall of the stock owned by the plaintiffs in Nos. 3495 and 3509 at the time of the loan. The NCRA appraised the value of the Black-Marshall properties at the time of the loan as being very little, if any, in excess of the amount of the loan. D. 259, 260; D. 227, 229.

IX.

There is no evidence that the following plaintiffs in Nos. 3495 and 3509 relinquished or sold their stock in the Black-Marshall Oil Company as a result of any misrepresentation by anyone: Bowers, 250 shares; Ets Hokin, 450 shares; Jones, 500 shares; McBride, 500 shares; Nelson, 1,000 shares; Amen, 100 shares; Baldwin, 100 shares; Elving, 40 shares; Edith Hall, 2900 shares; Ogle, 325 shares. D. 66; D. 67; D. 69; D. 103; D. 68.

[fol. 89]

X.

Black received a letter from Ives dated November 10, 1945, stating that Ives had told the Aledo stockholders that Black-

Marshall was sold and the Landowners and undeveloped properties retained which would be the basis of a new company after two years and that Black should so inform Wadleigh. This was the first notice to Black of Ives' misrepresentations. Black took no action as a result of or after receiving this letter. D. 308; D. 319. Ex. 12, D. 364.

XI.

At the time of the incorporation of Black-Marshall Oil Company, the corporation was without funds with which to develop its oil properties. Funds were obtained to develop such properties by Black's obtaining loans from various lending agencies which he personally guaranteed up to $1,000,000 at the First National Bank & Trust Co., of Oklahoma City, alone, throughout the existence of the corporation. D. 244, 245; Ex. R-3, D. 550; Ex. Y, D. 437. During the corporate existence, Black carried an account with the corporation and took advances from and made advances to the Black-Marshall Oil Company. D. 341, 342, 245; Ex. K, D. 432. All such transactions were regularly kept and recorded on the books and records of the corporation and an audit was made, beginning on July 31, 1940, at the end of each fiscal year which disclosed the balance in all accounts, including Black's account. Ex. E-1, D. 441; Ex. R, D. 435; Ex. Y through Ex. D-1, D. 438 to 441. At the end of the fiscal year July 31, 1940, Black-Marshall owed Black $15,993.25; on July 31, 1941, $5,416.70; on July 31, 1942, $2,305.62; at the end of the fiscal year July 31, 1943, Black owed the corporation $3,343.96; on July 31, 1944, $23,907.85; and on July 31, 1945, $3,092.51. Thereafter Black obtained substantial funds for his own private purposes from Black-Marshall, including $250,000 for a tuna boat, all of which items were regularly charged to Black's account on the books of the corporation and the account closed out by Black's check dated June 30, 1947, in the amount of $591,064.07. D. 262, 332, 351, 337, 338; Ex. S-3, D. 550; Ex. 290, D. 407.

The stock purchased from the plaintiffs and others was charged first to the Dale Ives stock account and later to the [fol. 90] W. H. Black stock account and the suspense stock account, which accounts were finally balanced and closed

out in June, 1947. Ex. 288, 289, D. 407; D. 260; Ex. 88, 89, D. 378; Ex. 108, 109, 110, D. 382.

XII.

In June of 1947 Black sold his stock in Black-Marshall to the NCRA for $51.06 a share. D. 262, 256; D. 232-236; D. 171-173. The NCRA also purchased stock held by Dale Ives as executor of the Boyd estate. D. 227-231. Dale Ives was employed by NCRA to send out notices for a meeting of the stockholders to consider dissolution and to dissolve the Black-Marshall Oil Company. Ex. N-1, D. 527; Ex. O-1, D. 528. The Black-Marshall Oil Company was dissolved and a statement of intent to dissolve by voluntary action of the corporation was filed of record in Mercer County, Illinois, on June 30, 1947, recorded in book 185 on pages 451 and 452, and the articles of dissolution of Black-Marshall were filed in Mercer County, Illinois, on July 1, 1947, recorded in book 185, pages 453 to 456, inclusive. Ex. A-4, D. 552-553; D. 227-231; D. 232-236; Ex. 279, 280, D. 405; Ex. P-3, D. 549.

After dissolution, all the assets of the Black-Marshall Oil Company were distributed in kind pro rata to its stockholders of record, including the NCRA. D. 171-173, 177-178; D. 228; Ex. E-4, D. 553; Ex. F-4, D. 554; D. 232. Such dissolution and distribution of assets was made after Black's repayments to the corporation and the closing out of all Black's accounts with the corporation and after the stockholders of Black-Marshall, including the NCRA with 65,126 shares and Victor Roos with 10,000 shares, had full knowledge of Black's accounts and the methods of balancing such accounts. D. 256, 257; D. 229-231; D. 232-236; Ex. 279, 280, D. 405; Ex. 292, D. 408; Ex. E-1, D. 439. Minute Book P. 94.

XIII.

The evidence discloses no purchaser could be obtained who would pay enough to net each stockholder in Black-Marshall $10 a share in 1944 and the value of Black-Marshall stock in 1944 did not exceed $10 a share. D. 267, 304, 299; D. 8; D. 38; Ex. A-2, D. 533; Ex. A-3, D. 543; Ex. Z-2, Ex. Y-2, [fol. 91] Ex. B-3, D. 543; Ex. X-2, D. 542; Minute Book pg. 56, 57; Ex. 344 and 345, D. 414.

Prior to the NCRA loan to Black-Marshall on October 1, 1945, no purchaser could be found who would pay enough for Black-Marshall to net the stockholders $12 a share and the stock of Black-Marshall did not exceed in value $12 a share. D. 227; D. 229; D. 258; D. 8; D. 38; Ex. K-3, D. 546; Ex. 25, 26, 27, D. 368. After the loan to Black-Marshall on October 1, 1945, some stock was purchased by Black-Marshall at $17.50 a share. D. 318-319; Ex. 116, D. 384; Ex. 115, 113, D. 384; Ex. 117, 118, D. 385. There is no other evidence of the value of Black-Marshall stock at this time.

The increase in value of Black-Marshall stock after September 30, 1945, came as a result of the drilling program of Black-Marshall and the obtaining of 146 producing wells, thus increasing the production of the Black-Marshall Oil Company during the period when the price of oil rose from $1.25 per barrel to $1.85 per barrel. D. 255, 259; Ex. G-1, D. 441; Ex. I, D. 431.

Conclusions of Law.

I.

The suits brought by the individual plaintiffs are not class suits of any type. Each plaintiff has an individual action for a purported fraud to such one individually and not as a member of a group; such action must be brought by each such individual as a separate and distinct action.

143 F.2d 503, 528, York v. Guarantee Trust;
164 F.2d 387, Steele v. Guarantee Trust;
13 F.R.D. 498, Gilbert v. Clark;
169 F.2d 266, Fisch v. G. M. Corp.;
133 F.2d 101, Farmers Coop. Oil Co. v. Socony Vacuum Oil Co.;
80 Fed. Supp. 333, Tittle vs. G. M. Corp.;
69 Fed. Supp. 621, Wright v. U. S. Rubber Co.;
106 F.2d 341, Ry. Exp. Agcy. v. Jones;
75 F.2d 447, Jordan v. Buick Motor Co.;
71 F.2d 487, Baker v. Spokane Savings Bank;
15 Fed. Supp. 497, Hammer v. British Type Inv.;
10 Fed. Supp. 532, Willcox v. Harriman Sec. Corp.

[fol. 92] II.

There is no showing of jurisdiction or of facts disclosing jurisdiction in any of the intervening petitions filed by any of the individual plaintiffs.

III.

After the co-receivers filed an action on behalf of the Black-Marshall Corporation, none of the individual plaintiffs thereafter had any right to pursue any alleged corporate wrongs.

124 F.2d 934, Coyle v. Skirvin;
327 U.S. 160, 90 L. Ed. 595, Meyer v. Fleming;
330 U.S. 518, 91 L. Ed. 1067, Koster v. Lumbermen's Mutual Cas. Co.;
142 F.2d 422, Goldstein v. Groesbeck;
149 F.2d 529, In re: Chicago, R. I. & P. Ry. Co.;
129 F.2d 815, Wachsman v. Tobacco Products Corp.;
129 F.2d 283, Lucking v. Delano;
45 F.2d 968, Watts v. Vanderbilt;
284 Fed. 797, Klein v. Peter;
88 F.2d 554, Long v. Stites.

IV.

The Black-Marshall Oil Company was incorporated and dissolved in the state of Illinois and the relationship of the parties is governed by the Illinois law.

131 F.2d 400, Maxwell v. Enterprise Wall Paper Mfg. Co.
193 F.2d 666, Mayflower Hotel Stockholders Protection Committee v. Mayflower Hotel Corp.
196 F.2d 40, Air Traffic & Serv. Corp. v. Fay;
163 F.2d 804, Langfelder v. Universal Lab.
143 F.2d 752, RFC v. Goldberg;
179 F.2d 760, Kroese v. Gen. Steel Castings Corp.;
162 F.2d 36, Zahn v. Transamerica Corp.

V.

The sale to the NCRA in June of 1947 was of stock and not assets and the NCRA received its proportionate part

of the assets of Black-Marshall on distribution after dissolution and thereafter purchased the remaining assets which had belonged to Black-Marshall from the other stockholders [fol. 93] who received their proportionate part of the Black-Marshall assets on distribution after dissolution.

VI.

The evidence does not establish that there was any conspiracy between Mr. Black or any of the defendants with Mr. Ives or any one.

VII.

The evidence does not establish that Mr. Ives was the agent of Mr. Black.

VIII.

The individual plaintiffs have proved no injury to themselves resulting from the sale of their stock in Black-Marshall in 1944 and 1945.

IX.

The Black Marshall corporation and all the stockholders of Black-Marshall in June of 1947 approved and ratified Mr. Black's payments and the balancing of Mr. Black's accounts with the Black-Marshall Corporation.

X.

The actions of the individual plaintiffs should be dismissed and judgment entered for the defendants for the defendants' costs.

XI.

The action of the co-receivers should be dismissed and judgment entered for the defendants for the defendants' costs.

Foulston, Siefkin, Schoeppel, Bartlett and Powers.

By Malcolm Miller, Attorneys for defendants.

In United States District Court

Plaintiffs' Substituted Requested Findings of Fact (No. 3495)—Filed June 19, 1953

1. Plaintiff A. M. Amen is a resident and citizen of the State of South Dakota, residing in the City of Yankton, South Dakota. (Answer, paragraph 1)

[fol. 94] 2. Defendant William H. Black is a resident and citizen of the State of California, residing in the City of La Jolla, California. Defendant Landowners Oil Association is a corporation organized under the laws of the State of Delaware, and is authorized to do business and is doing business in the State of Kansas. (Answer, paragraph 1)

3. The amount in controversy between the plaintiff and defendants is in excess of Three Thousand Dollars ($3,000), exclusive of interest and costs. (Answer, paragraph 2)

4. The complaint herein, as thereafter amended, was filed by A. M. Amen on June 28, 1949 on behalf of himself and all other shareholders of the Black-Marshall Oil Company similarly situated.

5. On June 29, 1949 William H. Black entered his general appearance in this action, waiving the issuance and service of summons upon him. (Appearance).

6. Thereafter, upon motion and pursuant to leave of Court duly granted, H. C. Wadleigh, T. N. Danford, L. E. Robinson, Hays Hall, H. W. Riley, Gerald C. Baldwin, Spencer I. Berglund, John S. Bowers, Fred O. Brown, William Brown, Velma Brown, Vernon T. Clark, Grace Clark, Ruth Danford, Edith Hall, R. P. McBride, Mabel Nelson, E. W. Robinson, Maud E. Robinson, Maud T. Rogers, C. F. Runbom, Beulah Runbom, Clarence Stephens, Nancy Stephens, Ellen Wadleigh, Harry Ogle, Fred Elving, Hugh D. and Larry Stites (by Lois L. Stites, their mother and next friend), Kenneth D. Constant, Hazel Constant, J. R. Sherrard, J. K. Stevenson, Myrtle Lundblad, Mable Lundblad, Roy Jones and Barney Ets-Hokin filed intervening complaints as members of the class on behalf of whom plain-

tiff A. M. Amen had instituted the above entitled action. (Pleadings)

7. On October 18, 1949, in an action then pending in the United States District Court for the Southern District of Illinois, Northern Division, entitled A. M. Amen v. Black-Marshall Oil Company, et al., Civil No. P-1094, upon application by plaintiff therein and notice to all parties served with process in that action and the Secretary of State of the [fol. 95] State of Illinois, the Court duly appointed D. Arthur Walker and Fred Windish as co-receivers of the Black-Marshall Oil Company, said co-receivers duly qualified and have at all times subsequent thereto been the duly qualified and acting co-receivers of the Black-Marshall Oil Company. The order of appointment, made after a full hearing, authorized and directed the co-receivers to prosecute and defend, intervene in or become a party to pending suits at law or in equity and to initiate further proceedings for the collection, protection and distribution of the assets of the Black-Marshall Oil Company or its subsidiaries, and for the collection and liquidation of any claims, rights or causes of action that may exist as between shareholders or former shareholders of said Company. (Exhibit 1)

8. D. Arthur Walker and Fred Windish thereafter filed an intervening complaint as co-receivers of the Black-Marshall Oil Company and parties-plaintiff in this action pursuant to motion and leave of Court duly granted. (Pleadings)

9. Anwers to the complaint and intervening complaints were thereafter filed by defendant William H. Black, hereinafter referred to as Black. (Pleadings)

10. This action was consolidated for trial with actions No. 3509 and No. W-143, and the cases thus consolidated were tried at Wichita, Kansas from April 21 to May 14, 1952, inclusive.

11. In the fall of 1938, Black, as party of the first part, entered into an agreement with certain parties of the second part residing in and around Aledo, Illinois for the purpose of forming the Petroleum Investment Company, an unincorporated association. This agreement and the relationship

created thereby continued in full force and effect until the formation of the Black-Marshall Oil Company in January of 1940. (Exs. 4, 14, 54, 55; Tr. 71, 75, 76, 182-84, 278-79, 399-403, 456, 614-16, 711-14, 947-48, 1006-20, 1037, 2354-55.)

12. The agreement forming the Petroleum Investment Company was drafted by Black and Dale G. Ives, a practicing attorney and resident of Aledo, Illinois. (Tr. 1001-02) This agreement provided that the purpose of the association [fol. 96] thus formed was to acquire and develop oil and gas leasehold interests and to do all things necessary in the ownership and disposal of such properties and their products; that Black was to act as the authorized agent of the parties of the second part in the transaction of all business connected with said association without interference from said parties of the second part; that Black was to receive 25 per cent of all net profits for his services and that the parties of the second part were to share in 75 per cent of the net profits in accordance with the relative amounts of their contributions to the said association. (Ex. 4)

13. Among the parties of the second part who executed the Petroleum Investment Company Agreement were Dale G. Ives (hereinafter referred to as Ives), Earl D. Boyd, T. N. Danford, Spencer I. Berglund, L. E. Robinson, H. D. Stites, H. C. Wadleigh, Hazel Constant, Maud T. Rogers, Edith Hall, Hays Hall, J. K. Stevenson, J. R. Sherrard, and Myrtle Lundblad. The parties of the second part were induced to enter into said agreement because of their faith and confidence in Ives and Black, and the representations made to them by Ives and Black. (Tr. 68-69, 73, 181, 185, 187, 216-17, 282, 405, 457, 504, 721, 948, 1005, 2317)

14. As the authorized agent and representative of the parties to the Petroleum Investment Company Agreements, Black acquired and developed leasehold interests in Illinois and Indiana in the latter part of 1938 and the early part of 1939. (Tr. 71, 183, 1007, 1020-21)

15. The operations of the Petroleum Investment Company were transferred to Kansas in the spring of 1939 and Black thereafter acquired, on behalf of the parties to the Petroleum Investment Company Agreement, certain leases

known as the Esfeld, Hoffman, Weber, Dolechek and Krier leases. (Exs. 6, 7, 10, 56, 57; Tr. 75-76, 184, 279, 616, 1006-18, 1037, 2354-55)

16. The financial contributions made by the parties of the second part to the Petroleum Investment Company Agreement were paid to Ives who thereupon transmitted the funds to Black, except in a few instances when the contributions were made directly to Black. (Tr. 1006-20, 2354-72; Ex. 80)

[fol. 97] 17. The funds used by Black to purchase and develop the leases acquired on behalf of the Petroleum Investment Company during 1938 and 1939, including the Esfeld, Dolechek, Hoffman, Weber and Krier leases in Barton County, Kansas, were furnished by the parties of the second part to the Petroleum Investment Company Agreement pursuant to the provisions of that Agreement. Black did not use any of his own funds to finance the acquisition and development of said leases, and the funds received by Black from the parties of the second part to the Petroleum Investment Company Agreement for the purpose of purchasing and developing the Esfeld, Dolechek, Hoffman, Weber and Krier leases exceeded the amounts expended therefor prior to January 10, 1940. (Exs. 10, 29-52; Tr. 1007-18, 1037-38, 1050-51, 2346-47, 2381-83, 2374-77, 2390-92, 2714-16; Black's Answers to Interrogatories Nos. 8 and 10; Ex. K)

18. In October, November and December of 1939 Black undertook the promotion of a corporation subsequently known as the Black-Marshall Oil Company. (Tr. 1041, 2393, 2430)

19. As a part of his efforts as a promoter, Black initiated and conducted negotiations with the officers and certain stockholders of the Landowners Oil Association for the purpose of securing for the proposed corporation the capital stock of said association in return for stock in the new company. (Exs. 58 to 65, inclusive)

20. These negotiations culminated in an agreement between Black and the Landowners Oil Association under which Black agreed that he and his associates would trans-

fer to the proposed corporation the Esfeld, Dolechek, Hoffman, Weber and Krier leases, as well as certain other leases in Indiana and Illinois, in return for 4,000 shares of preferred stock and 40,000 shares of common stock in the proposed company. Landowners Oil Association agreed to transfer its capital stock to the new company in return for 2,000 shares of preferred stock and 20,000 shares of common stock. (Exs. 58 to 65, inclusive)

21. Black and Ives also persuaded the other members of the Petroleum Investment Company, residing in and around Aledo, Illinois, that a corporation should be formed to take [fol. 98] over the operations and the assets of the Petroleum Investment Company. (Ex. 8; Tr. 2392-93)

22. Black and Ives represented to the other members of the Petroleum Investment Company that the proposed corporation would issue stock in return for the Esfeld, Dolechek, Hoffman, Weber and Krier leases as well as the other properties of the Petroleum Investment Company and that they would see to it that this stock was issued to the members of the Petroleum Investment Company in proportion to their financial contributions. (Tr. 78, 81, 189-91, 281, 284, 410-11, 617-18, 720, 949, 1041, 1043-44)

23. Black and Ives represented to the other members of the Petroleum Investment Company that Black was to receive 10,000 shares of common stock and 1,000 shares of preferred stock in the proposed corporation in return for his interest in the leases of the Petroleum Investment Company to be transferred to the new company and that the other members of the Petroleum Investment Company would receive common stock at $2 per share and preferred stock at $4 per share, computed on the basis of their financial contributions to the Petroleum Investment Company. It was on the basis of these representations that the interveners who were members of the Petroleum Investment Company approved the organization of the new corporation and the transfer of leases thereto. (Tr. 78-79, 81, 189-91, 281, 284, 410-11, 617-19, 720, 949, 1041, 1051-52, 1061-62)

24. The Black-Marshall Oil Company was granted a charter by the State of Illinois on January 3, 1940 and the

charter was accepted by the incorporators on January 11, 1940. (Ex. 2)

25. On January 23, 1940, Black fraudulently and without authority caused to be issued to himself on certificates 5 to 14, inclusive, 64,870 shares of common stock in the Black-Marshall Oil Company, of which Black thereafter claimed 32,457.50 shares, in addition to the 11,000 shares which he had agreed to accept for any interest which he might have in the leases transferred to the Black-Marshall Oil Company. On January 17, 1941, just prior to the annual stockholders meeting, Black cancelled said certificates for the purpose of concealing the invalid issue of said stock and [fol. 99] immediately after said meeting, Black caused said stock to be re-issued on certificates 155 to 166, inclusive. (Exs. 97, 98, 101; Tr. 914-16, 2440-41, 2447-48, 2452-53)

26. Black-Marshall Oil Company received no consideration for the 32,457.50 shares of stock which Black claimed on certificates 5 to 14, inclusive, or for the re-issue thereof on certificates 155 to 166, inclusive. (Findings 11 through 23, supra.)

27. Black's action in issuing to himself 32,457.50 shares of stock on certificates 5 to 14, inclusive, and the reissue thereof on certificates 155 to 166, inclusive, was contrary to the representations and agreements which he had made to and with the Landowners Oil Association and to the other members of the Petroleum Investment Company in promoting the organization of the Black-Marshall Oil Company. (Findings 20 through 23, supra.)

28. Black concealed from the other members of the Petroleum Investment Company and the stockholders of the Landowners Oil Association the excessive issue to himself of 32,457.50 shares of stock on certificates 5 to 14, inclusive, and the re-issue thereof on certificates 155 to 166, inclusive. Both at the time of the incorporation of the Black-Marshall Oil Company and at all times subsequent thereto, Black represented to the other initial stockholders in the Black-Marshall Oil Company that he had received only the 11,000 shares which he had agreed to receive in return for any interest which he might have in the leases transferred to

the Company. (Tr. 188-189, 281, 286-87, 619, 729-30, 761-62, 1047-48, 1051-52, 1061-62; Ex. I, p. 54.)

29. None of the intervenors who agreed to the organization of the Black-Marshall Oil Company on the basis of the representations and agreements made by Black as to the shares to be issued for the leases to be transferred to the company and who became stockholders of the company at the time of its incorporation, including L. E. Robinson, T. N. Danford, Maud T. Rogers, Fred Elving, J. K. Stevenson, Spencer I. Berglund, Myrtle Lundblad, Mable Lundblad, Hays Hall, Edith Hall, Hazel Constant, H. C. Wadleigh, R. P. McBride, J. R. Sherrard, Ruth Danford and E. W. Robinson, discovered the secret profit of 32,457.50 [fol. 100] shares of stock made by Black until the institution of this action. (Ex. 5, Ex. E; Tr. 213-15, 627.)

30. No subscription agreement was ever signed by any of the interveners in this action, either prior to, at the time of, or subsequent to the organization of the Black-Marshall Oil Company and no subscription agreement existed or was presented to the first meeting of incorporators, held at Aledo, Illinois, on January 11, 1940, or to the first meeting of the board of directors held at Wichita, Kansas. At no time did any of the interveners or any officers or directors of the Company other than Black, consent to or approve of the issuance of stock to Black in excess of the 11,000 shares of stock which Black represented that he was to receive for his interest in the leases transferred to the Company at the time of its incorporation. (Tr. 77-78, 188-90, 280-82, 407-09, 720, 813-14, 950, 1051-52, 1059.)

31. Although the other certificates issued to those who were initial stockholders in the Black-Marshall Oil Company were executed by Black as president of the Company and Ives as its secretary-treasurer, as required by the statutes of the State of Illinois, certificates 5 to 14, inclusive, were signed by Black alone. The stubs attached to all certificates initially issued were filled out by Ives with the exception of certificates 5 to 14, inclusive, which were filled out by someone other than Ives. (Ex. 97, 101; Tr. 914-16, 2432-40.)

32. Black and Ives were elected directors of the Black-Marshall Oil Company at the meeting of the incorporators held at Aledo on January 11, 1940. At the first meeting of the board of directors, Black was elected president of the Company, chairman of the board of directors, chairman of the executive committee and chairman of the finance committee. Ives was elected secretary-treasurer, member of the executive committee and member of the finance committee. Black and Ives held these positions at all times thereafter and completely dominated and controlled the business and affairs of the Company. (Ex. I, pp. 4-6; Tr. 624, 2456.)

33. The operations of the Black-Marshall Oil Company were conducted mostly in Kansas where it was authorized to do business and its principal office in Kansas was first [fol. 101] located at Wichita, Kansas, and subsequently at Great Bend, Kansas. All of the Company's books and records were kept at its office in Kansas, with the exception of a short period of time after its incorporation when certain of its records were kept at Aledo, Illinois. (Tr. 1171-79.)

34. The plaintiff and interveners who were stockholders of the Black-Marshall Oil Company resided at points far removed from Wichita and Great Bend, Kansas, and knew very little, if anything, about the affairs and conditions of the Company. These stockholders, who were mostly farmers, doctors and merchants knew little, if anything, about the oil business and were induced to invest their money in the Petroleum Investment Company and the Black-Marshall Oil Company because of the representations made to them by Black and Ives and because of their personal confidence and trust in Black and Ives, a confidence and trust which Black and Ives knew was reposed in them and which they continually fostered and encouraged. (Tr. 73, 1005, 2317.)

35. The books and records of the Company were not readily available or accessible to the plaintiff and interveners; after January of 1940, all stockholders meetings except two were held in Kansas. (Ex. I, pp. 85, 89, 92.) Said plaintiff and interveners were told by Black that they should rely upon the information which he would forward

to Ives and which he would have Ives give to them as his representative; said plaintiff and interveners believed and relied upon said statements made by Black and the information which was transmitted to them through Ives pursuant to said statements and representations by Black. (Tr. 73-74, 86, 95, 196, 204-05, 285, 288, 337, 365, 514, 520, 565, 574-75, 1100-02, 2459-61.)

36. In all of his dealings with plaintiff and interveners concerning their interests as stockholders of the Black-Marshall Oil Company, Black established and consistently observed the custom and practice of utilizing the services of Ives as his agent and representative. Black advised plaintiff and interveners, in Ives' presence, that Ives would be his agent and representative with respect to matters affecting their interests as stockholders of the Black-Mar-[fol. 102] shall Oil Company and this course of dealing was consistently recognized and fostered by Black and Ives. (Tr. 1006-10, 1100-02, 2213, 2316, 2459-61.)

37. In 1944, Black devised a scheme to defraud the plaintiff and interveners of their stock in the Black-Marshall Oil Company and their proportionate interest in the assets of the Company in order that he might increase his own proportionate interest in the Company's assets, enhance the value thereof, and thereafter sell the assets of the Company for his own personal profit and advantage. (Exs. 25, 84, 103, 278, 344, 345; Tr. 209, 635-37, 769-70, 1142-44, 2571, 2634-35, 2638, 2836.)

38. At the annual stockholders meeting held at Aledo, Illinois, in January of 1944, Black advised the assembled stockholders, consisting principally of those residing in and around Aledo, that it would be desirable to sell the producing properties of the Black-Marshall Oil Company. The stockholders thereupon authorized Black to consummate such a sale. In the presence of Ives, Black stated that he would report to Ives as his representative with respect to such sale and that he would have Ives transmit these reports as his agent and representative to the stockholders residing in and around Aledo, including the plaintiff and interveners herein. (Tr. 95, 204-05, 364-65, 414, 520, 572-74, 732, 851-52, 2461.)

39. On or about May 8, 1944, Earl Hatcher, representing the National Cooperative Refinery Association, made an arrangement with Black whereby Black was to secure and assign to said Association 51% of the outstanding stock of the Black-Marshall Oil Company.; on or about May 18, 1944, Black reached an agreement with the National Cooperative Refinery Association (hereinafter referred to as N.C.R.A.), superseding the arrangement previously made, by the terms of which the said Association agreed to finance the drilling of wells on leases owned by the Black-Marshall Oil Company in return for a call on the oil runs from such wells. Black concealed this agreement from the plaintiff and interveners. (Exs. 344, 345.)

40. Thereafter, in June of 1944, Black instructed Ives to secure one-half of the Black-Marshall stock held by the [fol. 103] plaintiff and interveners and to represent to the plaintiff and interveners for that purpose that Black had arranged a sale of the Black-Marshall Oil Company's producing properties, that it was necessary for the plaintiff and interveners to turn in to Black one-half of their stock endorsed in blank in order to bind the deal, that the undeveloped properties and Landowners Oil Association would be retained for the benefit of the plaintiff and interveners, that the plaintiff and interveners would receive ten dollars per share for the first one-half of their stock as their allocable portion of the price to be paid for the producing properties, that the remainder of their stock would have to be turned in in about a year and that the remainder of the purchase price to be paid for the producing properties would be distributed in return for the second one-half of the stock. (Tr. 1116-21, 635-37.)

41. Ives, acting pursuant to Black's instructions, immediately contacted the plaintiff and interveners and repeated to them, in substance, the representations which Black had directed him to make and ordered them to turn in one-half of their stock. (Tr. 988-89, 1116-21.)

42. In reliance upon the representations thus made and believing said representations to be true, A. M. Amen turned in 50 shares of stock; H. C. Wadleigh turned in 1,500 shares

of stock; T. N. Danford turned in 1,800 shares of stock; L. E. Robinson turned in 2,000 shares of stock; Hays Hall turned in 2,000 shares of stock; H. W. Riley turned in 250 shares of stock; Gerald C. Baldwin turned in 50 shares of stock; Spencer I. Berglund turned in 1,750 shares of stock; John S. Bowers turned in 125 shares of stock; Fred O. Brown turned in 250 shares of stock; William and Velma Brown turned in 200 shares of stock; Vernon T. and Grace Clark turned in 165 shares of stock; Edith Hall turned in 1,300 shares of stock; R. P. McBride turned in 200 shares of stock; Mabel Nelson turned in 500 shares of stock; E. W. Robinson turned in 500 shares of stock; Maud T. Rogers turned in 1,775 shares of stock; C. F. and Beulah Runbom turned in 250 shares of stock; Clarence and Nancy Stephens turned in 250 shares of stock; Harry Ogle turned in 125 shares of stock; Fred Elving turned in 440 shares of stock; Hugh D. and Larry Stites turned in 1,000 shares of [fol. 104] stock; Kenneth D. and Hazel Constant turned in 925 shares of stock; J. R. Sherrard turned in 3,500 shares of stock; J. K. Stevenson turned in 625 shares of stock; Myrtle and Mabel Lundblad turned in 1,050 shares of stock; Roy L. Jones turned in 250 shares of stock and Barney Ets-Hokin turned in 250 shares of stock. The plaintiff and interveners believed and relied upon the representations made to them at the time that they were induced to surrender the shares of stock stated in this finding and would not otherwise have parted with said stock. (Tr. 122-25, 126-28, 205-06, 290-92, 342-45, 365-67, 418-20, 459-61, 521-22, 577-78, 627-28, 676, 681, 686-87, 692-93, 733-34, 767-69, 795-96, 822-23, 852-53, 871-72, 958-59, 1116-21, 1606-07, 1635-37; Ex. 12.)

43. The representations made by Ives at Black's direction in securing the stock of the plaintiff and interveners for Black in 1944 related to material matters, were false in every respect and were known by Black and Ives to be false. (Tr. 295, 586, 2574.)

44. The stock secured by Ives for Black from plaintiff and interveners in 1944, was endorsed in blank, undated and was immediately delivered by Ives to Black. (Tr. 1120-21; Ex. 112.)

45. Black thereafter transferred 25,000 shares of the stock acquired for him by Ives, including 16,150 shares of the stock acquired from the plaintiff and interveners, to Richard Gill, Arthur Kincade and Edward Roos for a profit of $50,000; about a year later, Black reacquired 15,000 shares of such stock. (Exs. 102, 111, 115, 116; Tr. 1516-17.)

46. The funds used by Ives to pay the plaintiff and interveners $10 per share for the stock acquired from them in 1944, were furnished by Black, a portion of such funds coming from Black's personal account at the Fourth National Bank of Wichita, and the remainder representing Company funds which Black misappropriated. (Exs. 88, 89, 111; Tr. 1483, 1519-21, 2532.)

47. In the summer of 1945, Black further implemented the scheme to defraud the plaintiff and interveners by in- [fol. 105] structing Ives to secure the remainder of the stock held by the plaintiff and interveners and to state and represent to them that the sale of the producing properties had been completed, that each stockholder must immediately turn in the remaining shares of stock held by him, that the net purchase price paid for the producing properties would entitle each stockholder to $12 per share for the remaining stock, that Landowners Oil Association and the undeveloped leases which had been retained would form the nucleus of a new company to be organized at the end of two years and that each shareholder would be entitled to an interest in such new company proportionate to his interest in the Black-Marshall Oil Company. (Tr. 1128-32; Exs. 12, 81.)

48. Ives, acting pursuant to Black's instructions, immediately contacted the plaintiff and interveners, repeated to them in substance the representations which Black had instructed him to make and ordered them to turn in their remaining shares of Black-Marshall stock. (Exs. 12, 81; Tr. 1129-33, 1143-45.)

49. In reliance upon the representations thus made and believing said representations to be true, A. M. Amen turned in 50 shares of stock; H. C. and Ellen Wadleigh turned in 1,500 shares of stock; T. N. and Ruth Danford

turned in 2,075 shares of stock; L. E. and Maud Robinson turned in 1,650 shares of stock; Hays Hall turned in 2,200 shares of stock; H. W. Riley turned in 250 shares of stock; Gerald C. Baldwin turned in 50 shares of stock; Spencer I. Berglund turned in 1,733 shares of stock; John S. Bowers turned in 125 shares of stock; Fred O. Brown turned in 250 shares of stock; William and Velma Brown turned in 200 shares of stock; Vernon T. and Grace Clark turned in 200 shares of stock; Edith Hall turned in 1,600 shares of stock; R. P. McBride turned in 300 shares of stock; Mabel Nelson turned in 500 shares of stock; E. W. Robinson turned in 500 shares of stock; Maud T. Rogers turned in 1,775 shares of stock; C. F. Runbom turned in 250 shares of stock; Clarence and Nancy Stephens turned in 250 shares of stock; Harry Ogle turned in 200 shares of stock; Hugh D. and Larry Stites turned in 1,025 shares of stock; Kenneth D. and Hazel Constant turned in 925 shares of stock; J. R. [fol. 106] Sherrard turned in 3,433 shares of stock; J. K. Stevenson turned in 625 shares of stock; Myrtle and Mabel Lundblad turned in 1,250 shares of stock; Roy L. Jones turned in 250 shares of stock; Barney Ets-Hokin turned in 200 shares of stock. The plaintiff and interveners believed and relied upon the representations made to them at the time that they were induced to surrender the shares of stock stated in this finding and would not otherwise have parted with said stock. (Exs. 12, 81; Tr. 133-35, 206-08, 293-94, 344-45, 367-68, 422, 462, 524-25, 578-80, 632-34, 677, 682, 687-88, 693-94, 735-37, 769-73, 796-98, 825-26, 855-56, 875-76, 960-62, 1129-33, 1608-11, 1637-39.)

50. The representations made by Ives at Black's direction in securing the stock of the plaintiff and interveners for Black in 1945, related to material matters, were false in every respect and were known by Black and Ives to be false. (Tr. 295, 586, 2574.)

51. The stock acquired from the plaintiff and interveners in 1945, as described above was endorsed in blank, undated, and delivered to Black who thereafter claimed the stock as his own and exercised complete dominion and control thereover. (Exs. 86, 288, 289; Tr. 123, 234, 368, 994-95, 1122, 1973-74, 1978-79, 2261, 2589-90.)

52. At approximately the time that Ives, pursuant to Black's directions and scheme, was acquiring the last of the stock held by the plaintiff and interveners, Black undertook negotiations with N.C.R.A. for the purpose of securing further financial assistance in his scheme to defraud the plaintiff and interveners and to increase the value of the assets of the Black-Marshall Oil Company. These negotiations culminated in an agreement, dated October 1, 1945, by which N.C.R.A. agreed to loan Black-Marshall Oil Company $3,200,000 and to finance the drilling of new wells by payment of $22,000 per producing well drilled. Black concealed from the plaintiff and interveners these negotiations and resulting agreement with N.C.R.A. (Ex. 95; Tr. 2590-91, 2836.)

53. Black used a portion of the loan secured from N.C.R.A. for the purpose of paying the plaintiff and interveners $12 per share for the stock acquired in 1945. The sums [fol. 107] so used were carried on the books and records of the Company as advances to Black. (Exs. 288, 289; Tr. 1486.)

54. After Ives delivered to Black the stock secured from the plaintiff and interveners and which Black had full custody and control of said stock, he was informed by Ives of the specific fraudulent acts and representations which had been made to obtain said stock and Black was then in a position to elect to return said stock and to disaffirm and repudiate the acts and statements which Ives had made to said plaintiff and interveners in securing said stock for Black, or to ratify, confirm, adopt and approve the same and Black thereupon elected to and did approve, adopt, ratify and confirm all of Ives' fraudulent acts and representations made to said plaintiff and interveners for the purpose of depriving them of their stock and knowingly availed himself of all monies, profits and benefits resulting therefrom. (Exs. 12, 84, 86, 115, 116; Tr. 2571-74.)

55. On three different occasions, one shortly after the fraudulent acquisition of stock in 1944, and twice in November of 1945, three of the stockholders in the Black-Marshall Oil Company, who had been induced to surrender their

stock on the basis of the false representations described above, sought from Black further information with respect to the sale of producing properties which Ives had reported in securing their stock. In two instances, Black assured the inquiring stockholders that the representations made to them by Ives fully and accurately described the said sale. Black refrained from making any response to the other inquiry. (Exs. 12, 84; Tr. 205-09, 635-37, 769, 2634-35, 2638, 2836.)

56. Black adopted, ratified, confirmed and approved all of the false representations which Ives made in securing for Black the stock belonging to the plaintiff and interveners, and affirmatively concealed from the plaintiff and interveners the falsity of the representations so made. (Findings 51 through 55, supra.)

57. By reason of the loan agreements made with N.C.R.A. in May of 1944, and October of 1945, Black was able to and did engage in an extensive drilling campaign for the pur- [fol. 108] pose of enhancing the value of the assets of the Black-Marshall Oil Company. (Exs. 95, 345.)

58. Black consummated his scheme to defraud the plaintiff and interveners of their proportionate interest in the assets of the Black-Marshall Oil Company by arranging a sale of said Company or its assets to N.C.R.A. in June of 1947, for a gross price of $7,500,000 and a net purchase price, after certain deductions, of $4,420,634.58 (Exs. 282, 284, 291; Tr. 1757-60.)

59. In preparation for the sale to N.C.R.A. and for the purpose of securing to himself the benefits thereof, Black transferred to himself 5,990 shares of the stock fraudulently acquired from the plaintiff and interveners in 1944 and 1945, and pretended to retire the remaining shares of such stock. At the time that this stock was purportedly retired, Black claimed ownership of 62,126 shares out of a total of 86,577.25 carried as outstanding stock with the consequence that the profits resulting from the purported retirement of the stock acquired from plaintiff and interveners accrued principally to Black. (Exs. 97, 98, 99, 100, 102, 284, 291; Tr. 2624-25.)

60. Black caused the net purchase price realized from the sale to N.C.R.A. to be distributed to 86,577.25 shares of stock, including 62,126 shares claimed by Black, and 6,804.5 shares held by Ruth F. Black and William F. Black, at the rate of $51.06 per share. No distribution of the said purchase price was made to the plaintiff and interveners. Included among the 62,126 shares from which Black realized $51.06 per share were the 5,990 shares fraudulently acquired from certain of the interveners in 1944. (Exs. 99, 284, 291; Tr. 2624-25.)

61. Black, as president of the Black-Marshall Oil Company, also caused sworn articles of dissolution to be filed with the Secretary of State of the State of Illinois in which Black falsely represented that the property and assets had been distributed among the shareholders of the Company in accordance with their respective rights and interests, as required by the statutes of the State of Illinois. (Ex. 2.)

62. The net purchase price paid by N.C.R.A. properly [fol. 109] distributed to the stockholders entitled to share therein, including those shares which the plaintiff and interveners were fraudulently deprived of in 1944 and 1945, would have resulted in a distribution of $34.80 per share. (Exs. 284, 291, V.)

63. As a result of his scheme to defraud the plaintiff and interveners of their stock and the proportionate interest in the assets of the Black-Marshall Oil Company represented thereby, Black realized a profit of $1,167,630.76 at the time of the sale to N.C.R.A.; this profit consisted of the proceeds of the 5,990 shares of stock fraudulently acquired from plaintiff and interveners and transferred directly to Black and the increase in the value of Black's stock as a result of his purported retirement of the remainder of plaintiff's and interveners' stock. (Findings 58 through 62, inclusive.)

64. Black and Ives concealed the fraud which they had perpetrated upon plaintiff and interveners and said fraud was not discovered by the plaintiff and interveners until the spring of 1949. (Tr. 139-42, 210-11, 294, 347, 423, 526, 584, 640, 681, 695, 689, 739-40, 774, 800, 827, 857, 877, 963.)

65. During the period in which he was an officer and director of the Black-Marshall Oil Company, Black used Company funds, totaling $1,836,347.10 for his own personal use and benefit; such use of corporate funds was not authorized or approved by the corporation or its stockholders. (Tr. 1474; Ex. I, p. 70; Tr. 1384-85, 1793-95.)

66. Included among the uses to which Black devoted such funds were the following:

a. The acquisition of shares of Black-Marshall stock for himself and Mrs. Black, in addition to that fraudulently acquired from the plaintiff and interveners, from which Black and Mrs. Black thereafter realized very substantial profits. (Ex. 119; Tr. 1501-07, 2625.)

b. The acquisition by Black of Beech Aircraft stock on margin on which Black realized substantial profits. (Ex. 214.)

[fol. 110] c. The acquisition by Black of an interest in an Illinois farm which Black thereafter sold at a profit of $3,000. (Tr. 1335.)

d. The acquisition by Black of an interest in the Esfeld lease which resulted in substantial profits. (Tr. 1336.)

e. The acquisition of a commercial tuna boat on which substantial profits have been realized by Black. (Tr. 2744-46.)

f. Making loans to a Mr. Elwell at a ten per cent rate of interest. (Tr. 2746-47.)

67. Black did not pay the Black-Marshall Oil Company any interest on the funds misappropriated by him and all profits realized from the use of such funds have been retained by Black. (Tr. 1474-75, 2708, 2729.)

68. The plaintiff and interveners did not discover Black's improper use of corporate funds until the institution of this action.

69. During the period of his tenure as president, chairman of the board of directors, chairman of the executive committee and chairman of the finance committee, Black represented the Company in many transactions in which he or Mrs. Black were personally interested, and in which their interest was adverse to that of the Company. (Tr. 2497-98, 1228-29, 1197-1209, 1182-84, 1612-13, 1384-85, 894-97, 723-27, 622-24; Ex. 114.)

70. Included among such transactions were the following:

a. The transfer of substantial interests in leases owned by the Black-Marshall Oil Company to Arthur Kincade pursuant to an understanding between Black and Kincade that Black was to have a ½ interest in the properties thus transferred. (Exs. 303, 304-06, 308-11, 314-25, 326-29, 333-35, 341-42.)

b. The transfer of substantial interests in leases owned by the Black-Marshall Oil Company to Mrs. Black. (Exs. 127-35, J; Tr. 1309-23.)

c. The transfer of substantial interests in Black-Marshall [fol. 111] leases to the Ferrell-Young Drilling Company, a partnership in which Black owned a ¼ interest. (Exs. G, 140; Tr. 2232-33, 2538-41.)

d. Numerous drilling and other business transactions with the Ferrell-Young Drilling Company, a partnership in which Black owned a ¼ interest. (Ex. 141; Mrs. Black's Answer to Interrogatories 11, 12, 13.)

e. The rental of a rotary drilling rig from Mrs. Black during the years 1946 and 1947, for a total consideration of $206,433.92. (Mrs. Black's Answer to Interrogatory 13.)

f. The rental of a drilling in unit from Black, acquired by Black without cost, for a consideration of $750 per month. (Ex. 371; Tr. 2721-22.)

g. Transactions with the Anderson Trucking Company in which Black owned a substantial interest. (Tr. 2724-25.)

h. The transfer to Black in June of 1947, of oil and gas leases in the State of Texas, Kearney County, gas leases, Landowners Oil Association and a Black-Marshall Oil Company plane. (Ex. 283; Tr. 1476, 1735.)

71. These dealings between Black and the Black-Marshall Oil Company, in which Black purported to represent the Company as well as his own personal interests, were not authorized, approved or ratified by the Company or its stockholders and were not known to the plaintiff and interveners until the institution of this action. (Exs. I, 114; Tr. 622-24, 723-27, 894-97, 1182-84, 1197-1209, 1228-29, 1384-85, 1612-13, 2497-98.)

72. The profits derived by Black and Mrs. Black from their dealings with the Company have been retained by them.

73. On October 18, 1949, in an action then pending in the United States District Court for the Southern District of Illinois, Northern Division, entitled A. M. Amen v. Black-Marshall Oil Company, et al., Civil No. P-1094, upon application of Plaintiff therein and notice to all parties served with process in that action and the Secretary of State of the State of Illinois, the Court, after full hearing, entered an [fol. 112] order setting aside the dissolution of the Black-Marshall Oil Company. (Ex. 1.)

74. The plaintiff and interveners were shareholders of the Black-Marshall Oil Company at the time of the transactions complained of herein.

75. The claims asserted by the plaintiff herein and the claims asserted by the interveners have questions of law and fact in common, a common relief is sought, and the persons constituting the class on behalf of whom the plaintiff instituted this action are so numerous as to make it impracticable to bring them all before the Court. (Pleadings.)

76. The minutes and the minute book of the Black-Marshall Oil Company were changed and altered on several occasions; minutes which purported to reflect meetings and events which had not transpired were inserted therein; directors were listed as attending meetings which they did not attend; and no credence can be given to the minutes of the stockholders and directors meetings. (Ex. I; 622-24, 723-27, 894-97, 1304-08, 1384-85, 1612-13, 1777, 1781, 1786.)

77. The Court finds all other issues generally in favor of the plaintiff and interveners and against the defendants.

Conclusions of Law

1. The Court has jurisdiction over all parties and of the subject matter of this action.

2. The Petroleum Investment Company constituted a partnership created in the fall of 1939, and remaining in existence until after the organization of the Black-Marshall Oil Company with Black as the managing partner thereof.

3. All leases or interests therein acquired by Black during the existence of said partnership and subsequently transferred to the Black-Marshall Oil Company were, in legal effect, acquired on behalf of the said partnership and the beneficial ownership thereof vested in the members of said partnership in proportion to their financial contributions thereto.

4. The 32,457.50 shares of stock issued to Black on cer- [fol. 113] tificates 5 to 14, inclusive, and the re-issue thereof on certificates 155 to 166, inclusive, were void and invalid for the reason that the corporation received no consideration therefor and for the further reason that said certificates were not executed in accordance with the requirements of the statutes of the State of Illinois.

5. The 32,457.50 shares of stock issued to Black on certificates 5 to 14, inclusive, and the re-issue thereof on certificates 155 to 166, inclusive, constituted a secret profit realized by Black as a promoter of the Black-Marshall Oil Company.

6. Black is liable for and must account to the company and its stockholders for all the profits realized by him from the 32,457.50 shares of stock issued to and claimed by him on certificates 5 to 14, inclusive, subsequently transferred to certificates 155 to 166, inclusive.

7. Black sustained a fiduciary relationship to the plaintiff and interveners who were stockholders of the Black-Marshall Oil Company; in his dealings with said plaintiff and intervèners, Black willfully violated his duties, obligations and responsibilities as a fiduciary.

8. The plaintiff and interveners were defrauded of their stock in the Black-Marshall Oil Company in 1944 and 1945, the number of said shares being specified in the findings of fact filed herein, by the material, false, and fraudulent representations made to them by Ives.

9. The fraudulent representations made to the plaintiff and interveners in 1944 and 1945, were made by Ives acting as Black's agent and pursuant to the fraudulent scheme conceived by Black. After Ives, at Black's direction, had fraudulently obtained the shares of stock of said plaintiff and interveners, and which Black had full custody and control of said stock, Black elected to and did ratify, adopt, approve and confirm all that Ives had done to fraudulently obtain said stock and Black thereafter knowingly availed himself of all monies, profits and benefits arising therefrom.

10. The plaintiff and interveners are entitled to be restored to their status as stockholders of the Black-Marshall Oil Company; they are equitable owners of the stock which [fol. 114] ney were induced to part with as a result of Black's fraud and are deemed to have held equitable title at all times subsequent to such fraud.

11. The plaintiff and interveners, as equitable owners of stock in the Black-Marshall Oil Company, were and are entitled to share in the net price paid by N.C.R.A. for the assets of the Company, in proportion to their stock ownership and it was Black's duty and obligation, as the principal officer of the Company, to distribute to the plaintiff and interveners their full allocable portion of said purchase price.

12. Black is liable to the plaintiff and interveners and must account to them for their full allocable portion of the net purchase price paid by N.C.R.A. in 1947, minus the amounts received by the plaintiff and interveners in 1944 and 1945.

13. Black holds in trust and must account to the plaintiff and interveners for all profits realized by him as a result of his fraudulent scheme to deprive the plaintiff and interveners of their stock and their proportionate interest in the assets of the Black-Marshall Oil Company.

14. All profits realized by Black from his misappropriation of corporate funds, as specified in the findings filed herewith, belong to the Black-Marshall Oil Company and Black must account to the Company and its stockholders

for all such amounts as well as interest at 6 per cent on the funds misappropriated.

15. The transactions between Black, Mrs. Black and the Black-Marshall Oil Company in which Black represented the Company and his own personal interests, as specified in the findings filed herewith, are voidable and Black must account to the Company and its stockholders for all profits derived therefrom. Such profits are to be determined separately with respect to each particular transaction and any losses incurred by Black on a particular transaction may not be set off as against profits realized on other transactions.

16. The order appointing D. Arthur Walker and Fred Windish as co-receivers of the Black-Marshall Oil Company and setting aside the dissolution of the said Company was [fol. 115] duly and regularly made and entered by the United States District Court for the Southern District of Illinois, Northern Division, is binding upon this Court and cannot be collaterally attacked in this action.

17. This action is not barred by limitations or laches.

18. To protect all parties and in the interests of an orderly administration of justice, the relief to be awarded in these consolidated cases shall be apportioned as follows:

a. Recovery with respect to the fraudulent acquisition of stock from the plaintiff and interveners in 1944 and 1945, shall be awarded by separate judgments in No. 3495 and No. 3509, a satisfaction of the judgment in either action to constitute a satisfaction of the judgments in both actions.

b. Recovery with respect to the initial issue of stock on certificates 5 to 14, inclusive, and the re-issue thereof, the profits and interest due on account of the use of Company funds, and the profits due because of dealings between Black, Mrs. Black, and the Company shall be awarded to the co-receivers in No. W-143.

In United States District Court

Findings of Fact and Conclusions of Law (All Cases)—Filed April 1, 1954

At Wichita, Kansas, on the 21st day of April, 1952, these controversies came on for hearing, the respective plaintiffs appearing by their attorneys, D. Arthur Walker, W. L. Cunningham and William E. Cunningham, of Arkansas City, Kansas; Martin M. Lucente, Jack O. Brown of Chicago, Illinois; Burrell Barash of Galesburg, Illinois; Henry Gott, George B. Collins and W. R. Martin of Wichita, Kansas. The defendants appeared by their attorneys, George Siefkin, Malcolm Miller and Robert N. Partridge.

Thereupon, the cases proceeded to trial on the issues defined in the pleadings in all the actions which were consolidated for trial. After the cases were tried and upon request of counsel, time was given in which to file [fol. 116] suggested findings of fact and briefs by all parties after a full transcript of the trial was prepared. Thereafter briefs were filed and all the cases were argued on June 19, 1953, at Wichita, and after such argument were finally submitted to the Court. The Court, being duly advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

No. 3495 was begun by the filing of a complaint by Mr. Amen on June 28, 1949. The original defendants named were Black-Marshall Oil Co., a corporation; National Cooperative Refinery Association, a corporation; Landowners Oil Association, a corporation; William H. Black; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. At the plaintiff's motion the action was dismissed as to National Cooperative Refinery Association, a corporation; Leon Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund.

Sherrard later became an intervening plaintiff. An amended complaint was filed on July 25, 1950. Intervening complaints were filed by the following plaintiffs on the dates stated: On July 25, 1950, Baldwin, Fred Brown, Ogle, William Brown, Clark, Danford, Elving, Edith Hall, Hays Hall, McBride, Nelson, E. W. Robinson, L. E. Robinson, Dr. Rogers, Runbom, Riley, Stephens, Stites and Wadleigh; on February 10, 1951, Constant, Ets-Hokin, Sherrard and Stevenson, Lundblad and Jones.

The number of shares in controversy for the original and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1850; Danford, 3875; Elving, 440; Ets-Hokin, 450; Edith Hall, 2900; Hays Hall, 4200; Jones, 500; Lundblad, 2300; McBride, 500; Nelson, 1000; Ogle, 325; Riley, 1000; Robinson, 1000; Dr. Robinson, 3650; Dr. Rogers, 3550; Runbom, 500; Sherrard, 6983; Stephens, 1200; Stevenson, 1250; Stites, 1525; Wadleigh, 3000. Ex. V, D. 437; Ex. 97-102, D. 380.

All these shares were sold in 1944 and 1945, through Dale Ives. D. 6-8; D. 15, 16; D. 23; D. 29, 30; D. 33, 34; D. 38, [fol. 117] 39; D. 42, 43; D. 48, 49; D. 52, 53; D. 59, 60; D. 66; D. 66, 67; D. 68; D. 69; D. 74; D. 79, Ex. O, P, D. 434; D. 83; D. 87, 88; D. 92, 93; D. 96, 97; D. 103; D. 106; D. 159; D. 164; D. 168; Ex. V, D. 437; Ex. 97-102, D. 380.

This controversy concerns whether these original and intervening plaintiffs remained the equitable owners of the shares of stock set opposite their names hereinabove or whether they were entitled to recover from the defendants any sums in addition to the funds received at the time of the sale through Ives in 1944 and 1945.

This action was tried as a result of a consolidation with No. 3509 and No. W-143 during the trial of No. W-143. (T. 1539.)

II.

On June 28, 1949, Amen, Wadleigh, Danford, Dr. Robinson, Hays Hall and Riley filed action No. 3509. The original defendants named were Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; Wil-

liam H. Black; Ruth F. Black; William F. Black; National Cooperative Refinery Association, a corporation; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund; Cecil C. Anderson; Gladys M. Anderson; Lottie H. Anderson; Walter H. Beech; Howard S. Bryant; Fayette B. Dow; Walter G. English; Frank Fritts; Mary G. Fritts; Jas. H. Graham; Edith Hahn; Jesse S. Montgomery; Ruth Kellogg Orr; H. O. Peet & Co., a corporation; Edward Roos; Smith, et al, trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Smith, Anna Byron Waud, Emily Birnie Smith.

At the plaintiff's motion the action was dismissed as to all defendants except Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; later Berglund became an intervening plaintiff. On July 25, 1950, Bowers, McBride, Nelson, Stites, Baldwin, Berglund, Dr. Rogers, Runbom, Fred Brown, William Brown, Edith Hall, Ogle, Clark, Elving, Stephens and Mr. Robinson filed intervening complaints in No. 3509, and on February 10, 1951, Constant intervened in No. 3509.

[fol. 118] The number of shares in controversy held by the different original plaintiffs and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Berglund, 3483; Bowers, 250; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1850; Danford, 3875; Elving, 440; Edith Hall, 2900; Hays Hall, 4200; McBride, 500; Nelson, 1000; Ogle [illegible]; Riley, 1000; Robinson, 1000; Dr. Robinson, 3650; Dr. Rogers, 3550; Runbom, 500; Stites, 1525; Wadleigh, 3000. Ex. V, D. 437; Ex. 97-102, D. 380.

This case was in all respects similar to No. 3495 except for the difference in the original plaintiffs and the intervening plaintiffs. The cause was consolidated for trial with No. 3495 and No. W-143 during the trial of No. W-143. (T. 1539.)

III.

Co-receivers D. Arthur Walker and Fred Windish were appointed for the Black-Marshall Oil Company by the United States District Court for the Southern District of

Illinois in Civil Action P-1094. J. K. Stevenson, J. R. Sherrard and Spencer I. Berglund were defendants in this action and later became intervening plaintiffs in either 3495 or 3509. Ex. 1, D. 362. These co-receivers filed case No. W-143 on July 14, 1950. Subsequently the co-receivers filed an intervening petition in No. 3495 on September 25, 1950, and in No. 3509 on November 25, 1950. Such receivers were appointed in an action brought in the Southern District of Illinois by some of the plaintiffs in No. 3495 and No. 3509. Trial was had of this cause brought by the co-receivers during which cases Nos. 3495 and 3509 were consolidated with it. (T. 1539.) At the close of all the plaintiffs' evidence, the coreceivers elected to rely on their complaint in No. W-143. D. 168. The action of the co-receivers is to redress wrongs allegedly committed by the defendants to the corporation, Black-Marshall Oil Company.

IV.

The Petroleum Investment Company was formed in Illinois in late 1938 as a partnership association, joint adventure, syndicate or group of individuals, being, in addition to Black and Ives, Berglund, Hazel Constant, Danford, Edith Hall, Hays Hall, the Lundblad sisters, Dr. [fol. 119] Robinson, Dr. Rogers, Sherrard, Stevenson, Stites and Wadleigh. Many of these individuals signed Petroleum Investment Company agreements with Black. Most of the investors in each instance invested in the company through Dale Ives who was their leader and spokesman. The Petroleum Investment Company invested about $21,000.00 in leases and the development of leases but was not successful and by early 1939 had exhausted its funds in drilling nine dry holes in Illinois and Indiana. D. 2, 3, 10; D. 12, 13, 17; D. 21, 22, 24, 25; D. 35, 36, 37; Ex. F, D. 425, 426, 427; D. 41, 42, 44; D. 45, 46; D. 56, 57; D. 70, 71, 72, 75; D. 77, 78, 80; D. 98, 99, 102; D. 157; D. 162; D. 104, 105, 107, 108, 109-114, 136; D. 237, 267, 271, 272, 347; Ex. 4, D. 363; Ex. 14, D. 365; Ex. 54 and Ex. 55, D. 371; D. 307; D. 274; D. 347.

V.

In the early spring of 1939, Black left Illinois to meet Marshall in Tulsa, Oklahoma. Black acquired at least $10,000.00 from the sale of his interest in leases in White County, Illinois, which transaction and which leases had no connection whatever to the work of the Petroleum Investment Company, the Black Oil Company or the Black-Marshall Oil Company. D. 241, 276, 348. After an automobile accident in which Black received injuries which necessitated his hospitalization, he met Marshall in Tulsa and formed a partnership with Marshall for the acquisition and development of leases in Kansas. D. 237. In June or July, the partnership, consisting of Black and Marshall, acquired the Esfeld lease as a farmout from Sohio Oil Company and made a deal with Bennett, Bronson & Murmos to drill a well on the Esfeld lease which well came in as a producer in July of 1939 and was equipped by the partnership. D. 238, 239, 272-275. Thereafter and prior to the incorporation of Black-Marshall, the partnership acquired four other leases in Kansas, the Weber, the Dolechek, the Hoffman and the Krier. D. 238; D. 222; Ex. Y-3, D. 552; D. 205; D. 198-200. Beginning in late August or the early fall of 1939, Black received funds from Ives and others of the Petroleum Investment group to assist the partnership in acquiring and equipping leases and as of December 7, 1939, had received $17,650 from such group and had spent on the Kansas leases $28,415. D. 238, [fol. 120] 239, 275, 276; Ex. 10, D. 364; D. 278-281, 347. Subsequently and before incorporation, both Black and the Illinois investors put more money into the venture. D. 240, 241, 275, 276, 347, 348; D. 353, 354; Ex. W-3, D. 551; D. 280-281.

VI.

(A) The Black-Marshall Oil Company was incorporated on January 3, 1940, with an authorized capital of 20,000 shares of six per cent cumulative preferred stock at a par value of $10 and 200,000 shares of no par value common stock; a total of 9055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five

Kansas leases, the Dolechek, Esfeld, Hoffman, Krier and Weber, and the corporation assumed an indebtedness of $8,827.93 against such leases. D. 281; D. 242. The common stock was issued on the basis of $1 per share. D. 242; Ex. R, D. 435; Ex. Y through Ex. E-1, D. 438 to 441. The Petroleum Investment company investors were issued stock on the basis of one share of common for each $2 invested, including all money invested in the dry holes in Illinois, and one share of preferred for each $4 invested. D. 10; D. 13; D. 22; D. 36, 37; D. 42; D. 46; D. 57; D. 71, 72; D. 78, 80; D. 98, 99; D. 157; D. 112, 113; D. 136. Ives allocated the original issue of stock to each of the investors in the Petroleum Investment Company. D. 200; D. 213; Ex. X. D. 438; D. 263, 264. There was also authorized the issuance of 2,000 shares of preferred and 20,000 shares of common to be exchanged for 33,856.8 shares of the capital stock of the Landowners Oil Association. Ex. R, D. 435; Ex. Y through Ex. E-1, D. 438 to 441. Black became chairman of the board of directors and president of the corporation at its inception and continued in such offices throughout the existence of the corporation. D. 290. Ives became a director and secretary-treasurer of the corporation and continued in such offices throughout the existence of the corporation. D. 105. Berglund was elected a director in 1941 and served until he moved to Florida in September 1944. D. 72, 76. Dr. Robinson was elected a director at the 1941 stockholders meeting but was called to the Service and never served as a director for any real period of time. D. 23. Sherrard was elected a director at the 1941 stockholders [fol. 121] meeting held in January in Aledo and served and remained as a director until September 1945. D. 58, 62-64. Stevenson was elected a director at the inception of Black-Marshall but only came to Kansas once but was re-elected a director through 1944. Minute Book, Pg. 74 through 86; D. 160; D. 126. Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black, et al., for the partnership interest of Black and Marshall in the original five Kansas leases. D. 349, 286, 287; D. 205; Ex. 97-102, D. 380; D. 198-200; D. 259.

(B) After incorporation and throughout the history of the corporation to September 1945, Black received many requests, demands and incessant overtures for dividends, loans, money for stock from the Aledo group of stockholders. Ex. P-1, D. 528; H-2, D. 536; Ex. R-2, D. 540; Ex. P-2, D. 540; Q-2, D. 540; S-2, D. 540; T-2, D. 541; Ex. X-2, D. 542; F-3, D. 545; Ex. 123, D. 386; Ex. G-3, D. 545; Ex. 122, D. 386; Ex. 121, D. 386, D. 222, 223; Ex. 27, D. 368; D. 288; D. 294; D. 298; D. 305-307; Ex. 86, D. 378; D. 311; Ex. C-3, D. 544; Ex. O-2, D. 539; Ex. K-2, D. 537; Ex. Q-1, D. 528.

VII.

In the spring or early summer of 1944, many attempts were made to sell the stock in Black-Marshall Oil Company or the assets of Black-Marshall Oil Company to realize $10 a share to each stockholder. The NCRA was among the prospective purchasers but the contemplated sale to the NCRA fell through in May of 1944, and no sale could be made of Black-Marshall stock or assets to realize $10 a share for each stockholder. D. 249; D. 301; D. 250; D. 226-231; Ex. 344, 345, D. 414. During 1944, Dale Ives made misrepresentations to many Aledo stockholders:

In the summer of 1944, Ives told Berglund that the producing properties of Black-Marshall had been sold and that Berglund should turn in half his shares; that there would be an assessment of so much a share in case of starting up later on. D. 74.

In the summer of 1944, Ives told Fred Brown that Black [fol. 122] had made a deal with the Kansas City Coop. and that it would be necessary for the stockholders to turn in half their shares to show the purchasers that they were behind Mr. Black in the deal and that the Landowners and undeveloped leases would not be sold. D. 92.

Ives told William Brown in 1944, that Black had completed a deal to sell the producing wells of Black-Marshall and that the stockholders should turn in half their stock to show good faith in the deal; that the Landowners and undeveloped leases were being retained. D. 96.

In the summer of 1944, Ives told Clark that he would like for him to surrender half his Black-Marshall shares since the producing properties had been sold and half the stock was needed to show good faith and bind the sale but that the undeveloped properties would be retained and after two years each of the stockholders would receive his proportionate interest in such undeveloped properties. D. 33.

In June of 1944 Ives told Mrs. Constant that she should bring in half the shares she and her husband held since the producing properties were being sold and the Landowners and undeveloped properties retained; that Black needed half the shares in order to show good faith and that 51% of the shares were behind the deal. D. 79.

Ives told Danford in June of 1944, that a deal had been made where the stockholders would receive $10 a share for the first half of their stock and more for the second half of their stock; that the undeveloped properties and Landowners would be retained but that Black had to have 51% of the shares to bind the sale. D. 6.

In the summer of 1944, Ives told Hays Hall that Black had made a deal with the Coop. and sold the producing properties of Black-Marshall and had retained the undeveloped properties and Landowners which after two years would form the nucleus of a new corporation and each stockholder would get the same proportionate shares as they had held in Black-Marshall; that at least half the stock was needed to show good faith. D. 38.

In July or August of 1944, Ives told his secretary, Myrtle Lundblad, that Black had made a deal and was selling the [fol. 123] producing wells of Black-Marshall and retaining the undeveloped properties and Landowners; that the stockholders should send in half their stock so that Black could make the deal. D. 163, 164.

In June of 1944, Ives told Riley that Black had made a sale of the producing properties and had to have possession of at least 51% of the stock in order to show good faith; that the undeveloped leases and landowners were being retained; that the first half would be at $10 and the second half would be called for later and would bring more money. D. 52.

In the summer of 1944, Ives told Mr. Robinson that there were prospects of a sale of the Black-Marshall Company or its shares; that half the shares had to be put up to show good faith; that the purchaser had an option on buying the company or the producing wells and that the entire stock would eventually be sold. D. 29, 31.

Ives told Dr. Robinson about Easter time in 1944, that Black-Marshall was going to be sold and that Dr. Robinson should leave his shares with Ives. D. 26.

In the summer of 1944, Ives wrote Dr. Roge. s that Black was on a deal to sell Black-Marshall and that he needed her shares in order to show good faith in the deal; and told her that the shares would become worthless if she did not turn them in since the sale was going through. D. 42.

In May of 1944, Ives told Runbom to bring in his stock and Runbom did and asked that when it was re-issued it be issued jointly in both his and his wife's names. D. 87-89; Ex. H-1, H-2, H-3, D. 441.

In the summer of 1944, Ives told Sherrard that a deal had been made whereby the stockholders would receive $10 a share for the first half of their stock and probably more for the remaining half; that the sale was of the producing properties; that the undeveloped leases and Landowners were being retained. D. 59.

In June of 1944, Ives told Stephens that the producing properties of Black-Marshall had been sold and that Ives [fol. 124] was collecting half the stock in order to bind the deal but that the Landowners and non-producing properties were being held. D. 83.

Ives told Stevenson in 1944, that a sale had been made of Black-Marshall and in order to complete the sale the stockholders had to turn in half their stock at $10 a share. D. 159, 161; Ex. 347, D. 414.

In June of 1944, Ives told Dr. Wadleigh that a deal was being made to sell Black-Marshall; that Wadleigh should turn in half his stock since 51% of the stock was needed to show a bona fide deal. D. 15, 18.

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. D. 296; D. 350; D. 250; Ex. 121, 122, 123, D. 386; Ex. F-3, G-3; D. 545; Ex. 124, D. 387; Ex. E, D. 423.

Ives obtained approximately half the shares held by all the plaintiffs in actions Nos. 3495 and 3509 which he sent in to the Black-Marshall Company or to Bill Black, and distributed to the same stockholders $10 a share for their stock so turned in. Of the shares so turned in, 25,000 were sold to Roos, Gill and Kincade. D. 297, 301, 294; 11,714 were sold to Black and the remainder were paid for by Black-Marshall itself, retained by Black-Marshall and subsequently retired. D. 260; D. 302-303; D. 316-318; D. 250; Ex. 266, D. 402; Ex. V, D. 437.

VIII.

In 1945, further attempts were made to sell the Black-Marshall Oil Company or its stock to various purchasers for an amount to net each shareholder $12 a share. No purchaser was found who would pay an amount to net each shareholder $12 a share for the stock outstanding in Black-Marshall and a contemplated sale of the NCRA fell through in September 1945. D. 251; D. 226-231. In 1945, Ives made certain misrepresentations to various stockholders:

He sent a wire to Berglund in Florida on August 29, 1945, advising that the producing properties of Black-Marshall were sold for $12 a share and the Landowners Oil Company retained; that Berglund should send his stock [fol. 125] in blank to the Fourth National Bank in Wichita and close the deal by September 1. D. 74; Ex. 81, D. 376.

In July or August of 1945 Ives told Fred Brown that the deal with the Kansas City Coop, had gone through and it was necessary to turn in the remaining half of the stock and that after two years the stockholders would develop the undeveloped properties and Landowners which were retained and that the Black-Marshall stock would bring $12 a share. D. 93.

In the summer of 1945, Ives told William Brown that the deal was completed and that he should turn in the remainder of his stock; that the producing wells of Black-Marshall were being sold and the undeveloped leases and Landowners retained. D. 97.

In the latter part of August 1945, Ives told Clark to bring in his remaining shares; that the undeveloped prop-

erties were being retained; that the producing properties were sold and that after two years such undeveloped properties would be returned to the stockholders and each would receive the same proportionate amount as held in Black-Marshall. D. 34.

Ives wrote Black-Marshall relative to the sale of the Constant stock on September 17, and on September 20, 1945. Ex. O and Ex. P, D. 434.

About August of 1945, Ives told Danford that the sale of Black-Marshall was completed and that the rest of the stock should be turned in for $12 a share and that the Landowners and undeveloped acreage would be retained and held for two years because of tax matters or for legal reasons and would form the nucleus of a new corporation but that for two years the personnel of Black-Marshall had to work with the purchaser, the Kansas City Coop. D. 8.

Late in the summer of 1945, Ives told Hays Hall that the deal mentioned in 1944, was completed; that the stock should be turned in and he would receive $12 a share. D. 39.

In October of 1945, Ives told his secretary, Miss Lundblad, she should turn in the second half of her stock and would [fol. 126] receive $12 a share but that the stockholders would have more money coming since the Landowners and undeveloped properties would be divided among them, but not for two years, because of taxes. D. 164.

In August of 1945, Ives told Riley that the Black-Marshall sale was complete and the stockholders would receive $12 a share; that the undeveloped leases and Landowners were retained and would be returned as the nucleus for a new company in which the stockholders would receive the same proportionate ownership as they had held in Black-Marshall but that for two years the personnel of Black-Marshall would work for the purchaser, the Kansas City Coop. D. 53.

In the late summer or early fall of 1945 Ives told Mr. Robinson that the Black-Marshall deal had gone through, that there was a buyer who was going to take up the option on all the developed properties and close the deal for the sale of the stock which should be sent in; that a new company would get started after two years to operate the

Landowners, that the purchaser would not permit the operation of the Landowners or other leases for two years. D. 30.

Ives told Dr. Robinson in September of 1945 that Black-Marshall had been sold but that the stockholders would be in the oil business again in a new company on the same pro rata basis as held in Black-Marshall, soon. D. 24.

In the summer of 1945 Ives wrote Dr. Rogers to send in her remaining shares of Black-Marshall stock. D. 42.

In 1945 Ives told Sherrard that the balance of the stock should be turned in and would bring $12 a share but that the Black-Marshall sale did not include all the assets of Black-Marshall since the undeveloped properties and Landowners were being retained but would not come back to the stockholders for two years and that after such period they could make plans for development of such properties. D. 60.

In the summer or early fall of 1945 Ives told Stephens that Black was making a final deal on selling the producing properties of Black-Marshall but was retaining Landowners and the undeveloped properties for two years; that a side deal was being made whereby the Landowners and unde- [fol. 127] veloped properties would come back after two years but were held up for such period for tax purposes. D. 83.

In August of 1945 Ives told Stevenson that his remaining shares in Black-Marshall should be surrendered and that he and the other stockholders would be reissued the same amount of stock in the Landowners Company as they had held in Black-Marshall but not until after legal technicalities were ironed out would the reorganization take place. D. 159. Ex. 346, D. 414.

In the summer of 1945 Ives told Mrs. Stites that Black needed the rest of the stock to complete the sale of Black-Marshall and that a new company would be formed and the stockholders would have two shares for one on the shares held in Black-Marshall but not until after two years. D. 49.

In 1945 Ives told Wadleigh that Black-Marshall was sold and that Ives had to have the rest of his shares. D. 19.

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. D. 310, 311, 320, 321, 307; Ex. O, P, D. 434; Ex. 27, D. 368; Ex. 12, D. 364; Ex. 86, D. 378.

Ives obtained the balance of the stock held by the plaintiffs in Nos. 3495 and 3509 and delivered such stock to the Black-Marshall Oil Company or Black. The Black-Marshall Oil Company paid each one of the plaintiffs for such shares at the rate of $12 a share. D. 263; Ex. V, D. 437.

In September of 1945 a loan agreement was negotiated between Black-Marshall and the NCRA which was reduced to writing on October 1, 1945, whereby the NCRA loaned $3,200,000 to Black-Marshall and Black-Marshall obligated itself to drill 12 producing wells each year for which the NCRA would loan an additional $22,000 for each producing well so drilled. D. 252; D. 312; Ex. 95, D. 379. The NCRA was conversant with the purchase by Black-Marshall of the stock owned by the plaintiffs in Nos. 3495 and 3509 at the time of the loan. The NCRA appraised the value of the Black-Marshall properties at the time of the loan as being very little, if any, in excess of the amount of the loan. D. 259, 260; D. 227, 229.

[fol. 128]

IX.

There is no evidence that the following plaintiffs in Nos. 3495 and 3509 relinquished or sold their stock in the Black-Marshall Oil Company as a result of any misrepresentation by anyone: Bowers, 250 shares; Ets Hokin, 450 shares; Jones, 500 shares; McBride, 500 shares; Nelson, 1,000 shares; Amen, 100 shares; Baldwin, 100 shares; Elving, 440 shares; Edith Hall, 2900 shares; Ogle, 325 shares. D. 66; D. 67; D. 69; D. 103; D. 68.

X.

Black received a letter from Ives dated November 10, 1945, stating that Ives had told the Aledo stockholders that Black-Marshall was sold and the Landowners and undeveloped properties retained which would be the basis of a new company after two years and that Black should so inform Wadleigh. This was the first notice to Black of Ives' misrepresentations. Black took no action as a result of or after receiving this letter. D. 308; D. 319. Ex. 12, D. 364.

XI.

At the time of the incorporation of Black-Marshall Oil Company, the corporation was without funds with which to develop its oil properties. Funds were obtained to develop such properties by Black's obtaining loans from various lending agencies which he personally guaranteed up to $1,000,000 at the First National Bank & Trust Co., of Oklahoma City, alone, throughout the existence of the corporation. D. 244, 245; Ex. R-3, D. 550; Ex. Y, D. 437. During the corporate existence, Black carried an account with the corporation and took advances from and made advances to the Black-Marshall Oil Company. D. 341, 342, 245; Ex. K, D. 432. All such transactions were regularly kept and recorded on the books and records of the corporation and an audit was made, beginning on July 31, 1940, at the end of each fiscal year which disclosed the balance in all accounts, including Black's account. Ex. E-1, D. 441; Ex. R, D. 435; Ex. Y through Ex. D-1, D. 438 to 441. At the end of the fiscal year July 31, 1940, Black-Marshall owed Black $15,993.25; on July 31, 1941, $5,416.70; on July 31, 1942, $2,305.62; at the end of the fiscal year July 31, 1943, Black [fol. 129] owed the corporation $3,343.96; on July 31, 1944, $23,907.85; and on July 31, 1945, $3,092.51. Thereafter Black obtained substantial funds for his own private purposes from Black-Marshall, including $250,000 for a tuna boat, all of which items were regularly charged to Black's account on the books of the corporation and the account closed out by Black's check dated June 30, 1947, in the amount of $591,064.07. D. 262, 332, 351, 337, 338; Ex. S-3, D. 550; Ex. 290, D. 407.

The stock purchased from the plaintiffs and others was charged first to the Dale Ives stock account and later to the W. H. Black stock account and the suspense stock account, which accounts were finally balanced and closed out in June, 1947. Ex. 288, 289, D. 407; D. 260; Ex. 88, 89, D. 378; Ex. 108, 109, 110, D. 382.

XII.

In June of 1947 Black sold his stock in Black-Marshall to the NCRA for $51.06 a share. D. 262, 256; D. 232-236;

D. 171-173. The NCRA also purchased stock held by Dale Ives as executor of the Boyd estate. D. 227-231. Dale Ives was employed by NCRA to send out notices for a meeting of the stockholders to consider dissolution and to dissolve the Black-Marshall Oil Company. Ex. N-1, D. 527; Ex. O-1, D. 528. The Black-Marshall Oil Company was dissolved and a statement of intent to dissolve by voluntary action of the corporation was filed of record in Mercer County, Illinois, on June 30, 1947, recorded in book 185 on pages 451 and 452, and the articles of dissolution of Black-Marshall were filed in Mercer County, Illinois, on July 1. 1947, recorded in book 185, pages 453 to 456, inclusive. Ex. A-4, D. 552-553; D. 227-231; D. 232-236; Ex. 279, 280, D. 405; Ex. P-3, D. 549.

After dissolution, all the assets of the Black-Marshall Oil Company were distributed in kind pro rata to its stockholders of record, including the NCRA. D. 171-173, 177-178; D. 228; Ex. E-4, D. 553; Ex. F-4, D. 554; D. 232. Such dissolution and distribution of assets was made after Black's repayments to the corporation and the closing out of all Black's accounts with the corporation and after the stockholders of Black-Marshall, including the NCRA with 65,126 shares and Victor Roos with 10,000 shares, had full [fol. 130] knowledge of Black's accounts and the method of balancing such accounts. D. 256, 257; D. 229-231; D. 232-236; Ex. 279, 280, D. 405; Ex. 292, D. 408; Ex. E-1, D. 439. Minute Book P. 94.

XIII.

The evidence discloses no purchaser could be obtained who would pay enough to net each stockholder in Black-Marshall $10 a share in 1944 and the value of Black-Marshall stock in 1944 did not exceed $10 a share. D. 267, 304, 299; D. 8; D. 38; Ex. A-2, D. 533; Ex. A-3, D. 543; Ex. Z-2, Ex. Y-2, Ex. B-3, D. 543; Ex. X-2, D. 542; Minute Book pg. 56, 57; Ex. 344 and 345, D. 414.

Prior to the NCRA loan to Black-Marshall on October 1, 1945, no purchaser could be found who would pay enough for Black-Marshall to net the stockholders $12 a share and the stock of Black-Marshall did not exceed in value $12 a share. D. 227; D. 229; D. 258; D. 8; D. 38; Ex. K-3, D. 546; Ex. 25, 26, 27, D. 368. After the loan to Black-

Marshall on October 1, 1945, some stock was purchased by Black-Marshall at $17.50 a share. D. 318-319; Ex. 116, D. 384; Ex. 15, 113, D. 384; Ex. 117, 118, D. 385. There is no other evidence of the value of Black-Marshall stock at this time.

The increase in value of Black-Marshall stock after September 30, 1945, came as a result of the drilling program of Black-Marshall and the obtaining of 146 producing wells, thus increasing the production of the Black-Marshall Oil Company during the period when the price of oil rose from $1.25 per barrel to $1.85 per barrel. D. 255, 259; Ex. G-1, D. 441; Ex. 1, D. 431.

XIV.

The Court hereby resolves all controversial issues of fact and law not specifically covered herein in favor of the defendants and against the plaintiffs.

Conclusions of Law

I.

The exhibits offered in evidence by either party on which the Court reserved its ruling for later determination are all admitted in evidence.

[fol. 131]

II.

Exhibits K-1 and L-1 offered in evidence by the defendants for impeachment purposes relative to the testimony of Dale G. Ives and on which the Court reserved its ruling are admitted in evidence for the purpose offered. Insul-Wool Insulation Co. v. Home Insulation, Inc., 176 F.2d 502.

III.

The Black-Marshall Oil Company was incorporated and dissolved in the state of Illinois and the relationship of the parties is governed by the Illinois law.

131 F.2d 400, Maxwell v. Enterprise Wall Paper Mfg. Co. 193 F.2d 666, Mayflower Hotel Stockholders Protection

Committee v. Mayflower Hotel Corp. 196 F.2d 40, Air Traffic & Serv. Corp. v. Fay; 163 F.2d 804, Langfelder v. Universal Lab. 143 F.2d 752, RFC v. Goldberg; 179 F.2d 760, Kroese v. Gen. Steel Castings Corp.; 162 F.2d 36, Zahn v. Trans-america Corp.

IV.

The sale to the NCRA in June of 1947 was of stock and not assets and the NCRA received its proportionate part of the assets of Black-Marshall on distribution after dissolution and thereafter purchased the remaining assets which had belonged to Black-Marshall from the other stockholders who received their proportionate part of the Black-Marshall assets on distribution after dissolution.

V.

The evidence does not establish that there was any conspiracy between Mr. Black or any of the defendants with Mr. Ives or any one.

VI.

The evidence does not establish that Mr. Ives was the agent of Mr. Black.

VII.

The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, did not practice any fraud on any of the plaintiffs, and made no fraudulent misrepresentations to any one of the plaintiffs.

[fol. 132]

VIII.

The individual plaintiffs have proved no injury to themselves resulting from the sale of their stock in Black-Marshall in 1944 and 1945.

IX.

The Black-Marshall corporation and all the stockholders of Black-Marshall in June of 1947 approved and ratified

Mr. Black's payments and the balancing of Mr. Black's accounts with the Black-Marshall Corporation.

X.

The actions of the individual plaintiffs should be dismissed and judgment entered for the defendants for the defendants' costs.

XI.

The action of the co-receivers should be dismissed and judgment entered for the defendants for the defendants' costs.

Dated this 31st day of March, 1954.

Delmas C. Hill.

IN UNITED STATES DISTRICT COURT

ORDER CORRECTING CONCLUSION OF LAW VII (ALL CASES)--
Filed April 2, 1954

It appearing to the Court that there is a clerical error in Conclusion of Law VII, a part of the Findings of Fact and Conclusions of Law in the above entitled case dated March 31, 1954, and entered April 1, 1954, and that such Conclusion of Law VII should read:

The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, practiced any fraud on the plaintiffs, or made any fraudulent misrepresentations to any one of the plaintiffs.

It Is Ordered that these changes in Conclusion of Law VII be made by interlineation in the original instrument on file. Dated this 2d day of April, 1954.

Delmas C. Hill.

[fol. 133] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT (ALL CASES)—April 28, 1954

These controversies having been consolidated for trial, such trial beginning on April 21, 1952, and having been tried, briefed and finally submitted to the Court after argument on June 19, 1953;

The Court having entered its Findings of Fact and Conclusions of Law on April 1, 1954;

It Is Ordered that judgment be hereby entered in favor of the defendants for their costs herein and against the plaintiffs and that the actions be, and the same are hereby, dismissed.

Dated this 28th day of April, 1954.

Delmas C. Hill, Judge.

Approved as to form: Cunningham, Walker & Cunningham, by (Illegible); Jack O. Brown; Burrel Barash: Lilleston, Spradling, Gott & Stallwitz, by Henry V. Gott; Collins, Hughes, Martin & Pringle, by Robert Martin, Attorneys for Intervenors; Sidney, Austin, Burgess & Smith, by Douglas Smith, Attorneys for Plaintiffs; Foulston, Siefkin, Schoeppel, Bartlett & Powers, by Malcolm Miller, Attorneys for Defendants.

[fol. 136] IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings

Hon. Delmas C. Hill, Judge, Presiding.

APPEARANCES:

Mr. D. Arthur Walker, Mr. W. L. Cunningham, Mr. Jack O. Brown, Mr. Burrel Barash, Appearing for Plaintiffs.

[fol. 137] Mr. Geo. Siefkin, Mr. Malcolm Miller, Mr. Robert N. Partridge, Appearing for Defendants.

• • • • • • •

T. N. DANFORD testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your name, please?
A. T. N. Danford.
Q. And where do you live?
A. I live in Aledo, Illinois.
Q. How long have you resided there?
A. I have resided there for almost twenty-nine years.

• • • • • • •

[fol. 188]

• • • • • • •

H. C. WADLEIGH, testified as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. H. C. Wadleigh.
Q. Where do you live?
A. Seaton, Illinois.

• • • • • • •

[fol. 235] LEON EDWARD ROBINSON testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Leon Edward Robinson.
Q. Where do you live?
A. Aledo, Illinois.

• • • • • • •

[fol. 264] ERSKINE WILSON ROBINSON, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your name, please?
A. Erskine Wilson Robinson.
Q. Where do you live?
A. Rock Island, Illinois.

• • • • • • •

[fol. 278] VERNON T. CLARK testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Vernon T. Clark.
Q. Where do you live?
A. Aledo, Illinois.
Q. What business are you in?
A. Automobile and implement business.
Q. How long have you been engaged in that?
A. Since February 15th, 1929, a little over twenty-three years.
Q. And how long have you lived in Aledo?
A. Since December of 1941.
Q. Where did you live prior to that?
A. In Matherville, Illinois, a town thirteen miles northeast of Aledo.

• • • • • • •

[fol. 298]

• • • • • • •

HAYS HALL testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Hays Hall.
Q. Speak up a little louder.
A. Hays Hall.
Q. And where do you live, Mr. Hall?
A. Aledo, Illinois.
[fol. 299] Q. How long have you lived there?
A. My life time, over fifty years.

. . . . . .

[fol. 322]

. . . . . .

MAUD T. ROGERS testified as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name please?
A. Maud T. Rogers.
Q. And are you a married lady?
A. I am a widow.
Q. And what is your business or profession?
A. Physician.
Q. That is a medical doctor?
A. Yes.
Q. And do you now practice medicine?
A. Yes.
Q. And where do you practice?
A. Canton, Illinois.
Q. And how long have you practiced there?
A. Seven years.
Q. And prior to that time did you practice any place else?
A. Moline, Illinois.
Q. And how long did you practice in Moline?

A. About twenty-five years.
Q. When did you leave Moline, what year?
A. 1945.
Q. And that was the same year you moved to Canton?
A. Yes, sir.
Q. Do you know Mr. William H. Black?
A. I do.
[fol. 352]

. . . . . .

HUGH D. STITES, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Hugh D. Stites.
Q. Where do you live?
A. Forrest Grove, Oregon.
Q. What is your business or profession?
A. Physician and surgeon.
Q. You are now practicing in Oregon, are you?
A. Yes, sir.
Q. Where did you formerly live?
A. Aledo, Illinois.
Q. And will you tell us the years that you were in Aledo?
A. 1927 to August of 1943.
Q. And you were practicing medicine in Aledo while you were there, is that correct?
A. Yes, sir.

. . . . . .

[fol. 354]

. . . . . .

Q. Well now, you testified earlier that you departed Aledo, Illinois in August of 1943, to enter the Navy?
A. Yes, sir.

. . . . . .

[fol. 360]

. . . . . .

LOIS L. STITES, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Lois L. Stites.
Q. Where do you live?
A. Aledo, Illinois.
Q. And are you the former wife of the Doctor, Hugh Stites, who just testified here?
A. I am.
Q. How long have you lived in Aledo?
A. I have lived in and around Aledo all my life.

• • • • • • •

[fol. 385]

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HOWARD RILEY having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and deposed as follows:

[fol. 386] Direct examination.

By Mr. Walker:

Q. Will you state your name, please?
A. Howard Riley.
Q. And where is your home, Mr. Riley?
A. Aledo, Illinois.
Q. How long have you resided there?
A. 25 years.

• • • • • • •

[fol. 414]

• • • • • • •

J. R. SHERRARD testifies as follows:

Direct examination.

By Mr. Brown:

Q. State your name, please?
A. J. R. Sherrard.
Q. Where do you live?
A. Aledo, Illinois.
Q. What business are you engaged in?
A. I am in the furniture and undertaking business.
Q. And how long have you been in that business?
A. About twenty-five or six years.
[fol. 415] Q. How long have you lived in Aledo?
A. About twenty-six years.

* * * * * * *

[fol. 448]

* * * * * * *

A. M. AMEN, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. A. M. Amen.
Q. What is your occupation or profession?
A. Chiropractic.
Q. Where do you live, Doctor?
A. Yankton, South Dakota.
Q. And you are practicing your profession there, are you?
A. Yes, sir.
Q. How long have you practiced there?
A. Twenty-three years.
Q. And have you lived in Yankton, South Dakota the same period of time?
A. Yes, sir.

* * * * * * *

[fol. 450]

* * * * * * *

G. C. BALDWIN, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. G. C. Baldwin.
Q. Where do you live, Mr. Baldwin?
A. I live about thirteen miles southeast of Aledo, Illinois.
Q. How long have you lived there?
A. In that particular community?
Q. Yes, sir.
A. Well, I have lived in and about Aledo all my life.

* * * * * * *

[fol. 464]

* * * * * * *

SPENCER I. BERGLUND called as a witness for and on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Spencer I. Berglund.
[fol. 465] Q. Where do you live, Mr. Berglund?
A. Sarasota, Florida.
Q. And how long have you lived there?
A. Since 1949 the early part of September, 1944.

* * * * * * *

Q. Where did you live before moving to Sarasota, Florida?
A. Aledo, Illinois.
Q. How long did you live in Aledo, Illinois?
A. Oh, from 1899 to September, 1944.

Q. Forty-five years?
A. Yes.

. . . . . .

[fol. 487] HAZEL CONSTANT testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Hazel Constant.
Q. Are you a married lady?
A. Yes, sir.
Q. And where do you live now, Mrs. Constant?
A. I live in Leucadia, California.
Q. How long have you lived there?
A. Approximately seven years.
Q. And prior to that time, prior to living in Leucadia, California, where did you live?
A. I lived in Aledo, Illinois.
Q. And how long had you lived in Aledo, Illinois?
A. Well, I lived in and around Aledo all my life until I moved to, let's see, Norman, Oklahoma, in late 1944.
Q. You remained in Aledo then constantly up until 1942?
A. Yes.

. . . . . .

[fol. 504] CLARENCE STEPHENS testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Clarence Stephens.
Q. Where do you live, Mr. Stephens?
A. Five miles south of Aledo.
Q. How long have you lived in that neighborhood?
A. All my life, was born there.

. . . . . .

[fol. 511]

Q. And your wife's name is Nancy Stephens?
A. That is right.

[fol. 517]

C. F. RUNBOM testifies as follows:

Direct examination.

By Mr. Brown:

Q. State your full name, please.
A. C. F. Runbom.
Q. Where do you live, Mr. Runbom?
A. Orion, Illinois.
Q. Where is Orion in relation to Aledo, Illinois?
A. It is northeast of Aledo about thirty miles.
Q. How long have you lived there?
A. Ten years.
Q. What is your business?
A. Insurance business, sir.
Q. Do you know Dale Ives?
A. I do.
Q. How long have you known him?
A. I would say I have known him about twenty years, twenty-two years.
Q. I beg your pardon.
A. Twenty to twenty-two years.
Q. What has been the nature of your association with Mr. Ives?
A. Well, I was in the cleaning business in Aledo and he was one of our customers.

[fol. 518]

Q. Your wife's name is Beulah?

A. That is right.

. . . . . .

[fol. 532]

. . . . . .

FRED O. BROWN testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Fred O. Brown.
Q. Where do you live, Mr. Brown?
A. Aledo, Illinois.
Q. What is the population of Aledo, if you know?
A. About twenty-six or twenty-eight hundred.
Q. I didn't hear you.
A. From twenty-six to twenty-eight hundred, I imagine.
Q. And how long have you lived in Aledo?
A. All my life.

. . . . . .

[fol. 543] WILLIAM BROWN testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. William Brown.
Q. And are you the brother of the Fred O. Brown who just testified?
A. I am.
Q. Where do you live, Mr. Brown?
A. Aledo, Illinois.
Q. How long have you lived there?
A. All my life.
Q. And what is your age, please?
A. Forty-eight.

. . . . . .

Q. What is your wife's name?
A. Velma Brown.

. . . . . .

[fol. 586]

. . . . . .

EDITH HALL, testifies as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name, please?
A. Edith Hall.
Q. Where do you live, Mrs. Hall?
A. Aledo, Illinois.
Q. And what kind of work are you engaged in?
A. I am engaged in the shoe business with my brother.
[fol. 587] Q. And are you the sister of Hays Hall who was also a stockholder in the Black-Marshall Oil Company and who testified in these cases earlier?
A. I am.
Q. How long have you lived in Aledo?
A. My entire life.

. . . . . .

[fol. 850]

. . . . . .

C FERS IN EVIDENCE

(Plaintiff's Exhibit Number 283, having been offered and admitted in evidence, is contained in the case file.)

Colonel Walker: The Plaintiffs now offer in evidence Plaintiff's Exhibit Number 284, which is signed by the National Cooperative Refinery Association and also by W. H. Black and is what we might refer to as the escrow agreement filed with the Fourth National Bank, Wichita, Kansas. It is dated September 30, 1947. The letter which is [fol. 851] jointly signed by the National Cooperative Refinery Association and W. H. Black is addressed to the Fourth National Bank in Wichita, Kansas.

"Gentlemen: This letter agreement and escrow instruction is to be attached to and made a part of certain escrow instructions to the Fourth National Bank in Wichita, Kansas.

"We hand you herewith check of National Cooperative Refinery Association in the sum of Four Hundred Ninety-seven Thousand, Eight Hundred Nineteen Dollars and Twenty-one Cents ($497,819.21) payable to the order of the Fourth National Bank in Wichita, Kansas, to be held in escrow by your bank in accordance with the further instructions contained in this letter as follows:

"1. To be held in escrow by your bank for the ultimate payment to the persons named in Schedule 'A' attached hereto and made a part hereof in the proportionate amounts set opposite the name of each of such persons.

"2. The undersigned parties hereto expressly hereby agree between themselves that the said sum of money being so placed in escrow in the Fourth National Bank in Wichita, Kansas, has been withheld from the purchase price heretofore paid to former stockholders of Black-Marshall Oil Company for their proportionate parts of the assets of such corporation which they acquired on the dissolution of the corporation, and that such sum was so withheld from such purchase price in order to insure the payment of any unknown and/or undisclosed liabilities of Black-Marshall Oil Company and not reflected by the books and records of such company on June 30, 1947, specifically excluding, however, any unpaid bills or accounts which may have arisen in connection with any normal operating cost of Black-Marshall Oil Company prior to June 30, 1947, and further specifically excluding any income taxes or taxes of any kind or nature whatsoever for the fiscal year of Black-Marshall Oil Company ending July 31, 1947; and the undersigned parties hereto further expressly agree between themselves that when either of such parties receives notice of any claim against Black-Marshall Oil Company, they will give notice to the other party hereto, and im-
[fol. 852] mediately upon receipt of notice of such claim, National Cooperative Refinery Association agrees to make

and conduct an appropriate investigation of the same, and to prepare to defend against the same before any court or commission or other governmental or regulatory body before whom such claim, demand, or lawsuit is then pending, if National Cooperative Refinery Association and W. H. Black have decided to defend the claim rather than to authorise payment of the same; and the National Cooperative Refinery Association agrees to thereafter diligently conduct a proper defense against any such claim or demand in such court or before such commission or regulatory body, at its sole cost and expense, through the trial court, commission or regulatory body before whom such claim or demand may have been tried; and National Cooperative Refinery Association and W. H. Black further expressly agree that at any time during such proceeding, the said W. H. Black and/or his representatives or attorneys selected by him, shall have the right to participate in the defense against such claim, demand or lawsuit, and to assume the entire defense against the same if he so desires; and the expense incident to any appeal from the judgment or order of such forum in which such claim, demand, or action may be tried shall be paid from the said sum of money this day deposited in The Fourth National Bank in Wichita, Kansas as escrow agent. And it is further agreed by and between the undersigned parties hereto that no such claim, demand, action or lawsuit shall be settled, compromised or paid without the express written consent of W. H. Black.

"3. One-half of such sum of money so placed in escrow in The Fourth National Bank in Wichita shall be paid to the parties named in Schedule 'A' attached hereto, or their heirs, executors, administrators, successors or assigns, in an amount equal to one-half of the sum of money set out opposite the name of each of them, on June 30, 1948, less any such claims, payments or demands which may have theretofore been proven prior to that date, and such deductions from one-half of such fund to be so paid by The Fourth National Bank *I*n Wichita shall be certified to the said bank by an appropriate form of written certifi-
[fol. 853] cation executed by National Cooperative Refinery

Association and W. H. Black; and the remaining one-half of such sum this day deposited in escrow in The Fourth National Bank in Wichita shall be paid on June 30, 1949, to the persons named in Schedule 'A' attached hereto, or their heirs, executors, administrators, successors, or assigns, in an amount equal to one-half of the sum so set opposite the name of each of them, proportionately less any such claims, payments or demands which may have been proven between June 30, 1948, and June 30, 1949, and so certified by the undersigned parties hereto in the manner hereinbefore set out; and The Fourth National Bank in Wichita, Kansas, agrees to issue time certificates of deposit which properly show the deposit of the said sum of money in the said bank, subject to the terms and provisions of this letter, payable to bearer, and non-negotiable, but bearing interest at the rate of one percent (1%) per annum, with one such certificate of deposit so payable to bearer on June 30, 1948, and one additional certificate of deposit for one-half of such amount so payable to bearer on June 30, 1949.

"4. National Cooperative Refinery Association shall be reimbursed from this fund upon receipt by the said bank of such certificate so executed by National Cooperative Refinery Association and W. H. Black to the effect that any such claim, demand, liability or indebtedness has been paid by National Cooperative Refinery Association.

"Yours very truly,

"National Cooperative Refinery Association,
"By: ——"

Whoever the President is, I can't make out the name.

Mr. Siefkin: Mary, M-a-r-y.

Colonel Walker: Well, it is executed by the President of the Co-op and by W. H. Black and attested there.

The Schedule "A" referred to in the escrow agreement has the following names, shares and amounts withheld: It shows in Schedule "A", and I will read it first, the name and then the shares and then the amount withheld.

[fol. 854] Name	Shares	Amount Withheld Per Share—$5.75
Anderson, Cecil C.	300.40	$ 1,727.30
Anderson, Gladys M.	25	143.75
Anderson, Lottie H.	25	143.75
Beech, O. A.	500	2,875.00
Beech, Walter H.	500	2,875.00
Black, Ruth F.	6,804.05	39,123.29
Black, W. H., Assignee of National Cooperative Refinery Association	62,126	357,224.50
Bryant, Howard S.	2.50	14.38
Dow, Fayette B.	.50	2.88
English, Walter C.	50	287.50
Fritts, Frank	100	575.00
Fritts, Mary G.	100	575.00
Graham, Jas. H.	24.10	138.58
Hahn, Edith	.50	2.88
Huff, Leon F.	1,848.45	10,628.59
Ives, Dale G.	30	172.50
Ives, Dale G., Executor, Assignee of National Cooperative Refinery Association	3,000	17,250.00
Montgomery, Jesse S.	122	701.50
Orr, Ruth Kellogg.	50	287.50
Peet, H. O., & Company	200	1,150.00
Roos, Edward	10,000	57,500.00
Smith, et al., Trustees for Joan Birnie Hamill	96	552.00
Smith, et al., Trustees for Elizabeth Byron Smith	96	552.00
Smith, et al., Trustees for Harold Byron Smith	96	552.00
Smith, et al., Trustees for Anne Byron Waud	96	552.00
Smith, et al., Trustees for Emily Birnie Smith	384.75	2,212.31"

[fol. 855] Showing a total of shares of 86,577.25 and the amount withheld $497,819.21.

Then there is a receipt here but I don't think we need to read it. It is a receipt of the usual escrow receipt.

We offer in evidence Plaintiff's Exhibit Number 284.

Mr. Siefkin: We object only as to the time.

The Court: Very well. It will be admitted.

(Plaintiff's Exhibit Number 284, having been offered and admitted in evidence, is contained in the case file.)

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[fol. 862] JOHN J. WILLIAMS testifies as follows:

Direct examination.

By Colonel Walker:

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[fol. 872]

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Q. All right.

A. The 1945 transaction was charged first to suspense account and then transferred from suspense to W. H. Black's stock account.

Q. Very well. Now will you continue?

A. Then at this point the cost of 11,714 shares purchased [fol. 873] from the Aledo stockholders in 1944 was transferred from the Black stock account to the Black account receivable. That is the 11,714 shares which we called street certificates previously in the examination. That left a balance in the Black stock account of $831,483.06, which represents the 1945 transaction in Aledo.

So this account was balanced on June 30, 1947, by cancellation of 56,400.87 shares of Black-Marshall Company stock, and this closed out the W. H. Black stock account.

Q. Well now, assuming for my information, that Black was being charged with eight hundred thirty-one thousand plus dollars and he has a lot of this stock in his lock box and then there was cancelled out on June 30, 1947—approximately how many shares?

A. 56,400.87.

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[fol. 895] COLLOQUY BETWEEN COURT AND COUNSEL

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Another matter that I might inquire about that arises is probably of mutual interest to Mr. Siefkin and Mr. Black. As Mr. Siefkin has mentioned, and I think quite properly so, the cases, the one following this one and in fact, if not in any order of the Court, are more or less tried here as consolidated cases.

Now, I am in this position: That all I want is to understand the situation, if we are going to try the case following this we are perfectly ready to start in but I do not want to start notifying some witnesses who are at a distance to come here. In this case we brought witnesses from Florida, California, Oregon, and we will have them here but I do have some others that I want to endeavor to get here and if we are not trying this as a consolidated matter and are going to have a complete trial on the next one I want to have Mr. Williams, the accountant, do some additional work.

That is, I feel this way: That if, as a matter of fact, we have tried them as consolidated matters and there was an order to that effect I am perfectly willing to say, all right, then the evidence that is in this case as now is all that we intend to put in, we will not bring other witnesses and go ahead with the other investigation, but I wanted to find out what Mr. Siefkin thinks and how he felt about it and just have some understanding at this time.

The Court: Well, the reason I didn't consolidate the cases, gentlemen, was because of what counsel for the defendant indicated, that possibly they would have inconsistent defenses to these actions and I didn't want to consolidate the cases and compel them to put in inconsistent defenses.

However, the manner in which this case has been tried, it seems to me, in reality that the cases have been consolidated.

What does counsel for the defendant have to say about it?

Mr. Siefkin: That is what has been done over our objection, Your Honor, and we have had some difficulty in making some objections because they are entirely separate and different offenses.

[fol. 896] We don't think that the receivers, as such, have proved any cause of action on behalf of anybody they represent or could represent, so far as they are concerned. And I

don't know whether to put on any evidence in that. It is going to be a little difficult for me to separate the evidence but we expected to do so. I don't know what to say to Your Honor.

The Court: Well, I am not making any decision now on what our procedure will be, but it seems to me that we should proceed with a separate trial following this case of the stockholders' cases.

Mr. Siefkin: Let me say this to the Court, so there will be no mistake and maybe this is what Mr. Walker wants: I am not going to insist that these same witnesses come back and retestify in the other case, if that will help him any, why certainly he can have that agreement on my part.

The Court: I take it that you both would agree that any testimony that has been taken in this case that is competent in the other cases may be used in lieu of keeping the witnesses here. There will be no question about that between you, will there?

Colonel Walker: Not at all. We certainly don't want to inflict on the Court and have him sitting here and going through a lot of idle motions. That would be an insult to the intelligence of the Court and counsel. My thought was, that as far as the Plaintiffs here, I am not seeking any advantage, I think maybe it is probably to my disadvantage, but I just wanted to know where the cut-off date is. I am perfectly willing to say, "All right, we will consider them consolidated, and I won't bring any new witnesses or new evidence or have Williams look for it or anything else." In other words, Mr. Siefkin knows what the whole issue is. If he doesn't want to consider them consolidated, which I think they have been and which he called it to my attention, then I want to continue on looking for more evidence to bring in. Now that is about as plain as I can put it.

Mr. Siefkin: Actually it wouldn't serve any purpose for any of us for me to put on evidence in the receiver's action now and try and limit that and then let him put on evidence [fol. 897] in his so-called stockholders' suit and try and separate it out and put more evidence there.

I would think, while I have always objected to consolidation and still think that it is improper, and the evidence was offered and I think admitted upon the theory that this

was not the stockholders' theory but it was the receiver's suit. I haven't any objection to their going ahead and finishing the evidence on the stockholders' case and then I will throw all of my evidence in as quickly as I can as against both of them. Now, if that will help any, I can say go ahead and consolidate them.

The Court: Now what other attorneys haven't participated here besides Mr. Martin's firm that are interested in the stockholders' suit?

Colonel Walker: I talked to Mr. Martin and he felt that he would go along with whatever the Court sees fit to do. I didn't speak to Your Honor without asking him.

Well, then, could we do this, Mr. Siefkin: Suppose that, for the sake of having the matter before the Court, that we consider that they are consolidated, and I will finish my evidence in the morning, which is the evidence in both cases, and then I won't be bringing other witnesses here and having Mr. Williams look for more. In other words, that is all I have got and he knows what it is to meet.

The Court: Well, what about the other attorneys? Can you be ready to follow-up then?

Mr. Martin: I think we can, Your Honor. I will call this evening and try to get my witnesses here.

The Court: Now are there any other attorneys besides your firm?

Mr. Martin: Mr. Lucente's firm.

Mr. Lucente: Your Honor, I haven't participated openly but I have been watching things as they go in and we are quite satisfied to have the record here regarded as the record in our case.

The Court: Well, I think that would simplify the thing, gentlemen, to let the stockholders proceed with their evi- [fol. 898] dence after Mr. Walker is finished. After the receivers are finished, and then following that let the defendants put on their evidence in both cases. If that is agreeable with everyone concerned.

Mr. Siefkin: It is all right with us.

Mr. Martin: It is all right with me subject to my getting my witnesses here but I think I can.

The Court: If we have to adjourn for twenty-four hours I will do that.

Mr. Lucente: Your Honor, may I just add at this point that all of the clients that our firm represents have appeared and testified, so I don't think that there would be anything additional. We are quite agreeable to that.

Colonel Walker: All right.

The Court: We will plan on that procedure then.

Colonel Walker: All right, as I understand it, then we will consider that they are consolidated and the plaintiffs, as co-receivers, and the plaintiffs and stockholders are to get all their evidence in both cases before you are required to go ahead and meet it; is that the way we are proceeding?

Mr. Siefkin: Yes.

The Court: That is right.

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[fol. 920]

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J. K. Stevenson, testifies as follows:

Direct examination.

By Mr. Martin:

Q. Will you give your name to the Court, please?

A. J. K. Stevenson.

[fol. 921] Q. Where do you live, Mr. Stevenson?

A. Alexis, Illinois.

Q. Where is Alexis from Aledo, geographically?

A. Alexis is 20 miles southeast of Aledo.

Q. What is your business, Mr. Stevenson?

A. I am in the Banking business.

Q. How long have you been in that business?

A. I have been with this one bank twenty-eight years.

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[fol. 936]

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MYRTLE LUNDBLAD, testifies as follows:

Direct examination.

By Mr. Martin:

Q. Will you give your name, please?
A. Myrtle Lundblad.
Q. You will have to speak right up, Miss Lundblad, because this gentleman here had trouble hearing you and you will have to make all the lawyers hear you and the Court also.
A. All right.
Q. Where do you live, Miss Lundblad?
A. Aledo, Illinois.
Q. How long have you lived there?
A. All of my life.
Q. What do you do for a living there, Miss Lundblad?
A. I am secretary to Dale G. Ives.
[fol. 937] Q. Do you serve his law firm or just Mr. Ives?
A. Mr. Ives.
Q. How long have you worked for Mr. Ives?
A. Since 1930.
Q. Do you have a sister, Miss Lundblad?
A. Yes, Mabelle A. Lundblad.
Q. When did you first invest or become connected in any way with The Petroleum Investment Company?
A. I believe it was in 1939.
Q. How did that happen?
A. Well, they were organizing a Company, an investment Company of some kind. That is how I happened to start in. The people in Aledo were investing.
Q. Speak up.
A. They were investing in Aledo, they were starting a Company.
Q. Who told you about this Company being started?
A. Dale G. Ives.
Q. Did your sister, Miss Lundblad, also invest in that Company?
A. Yes.

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[fol. 952] MOTION TO DISMISS AS TO WILLIAM H. BLACK AND DENIAL THEREOF

Mr. Miller: Now, with that out of the way, if The Court please, we believe that since the receiver has now rested his case, the stockholders and Intervenors have rested their case, before we proceed we should be entitled to know where we stand. The receiver, as The Court well knows—that is case Number W-143 which we started to try here—he also had intervened in cases Numbers 3509 and 3495. We believe that at this point, if not earlier, the receiver must elect what case he relies upon to the exclusion of all other cases.

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Mr. Miller: Now, if The Court please, I want the record to show that we move that the corporate cause and the individual causes to be dismissed as to Mr. Black.

And in connection with that, and without trying to make any argument that we have already gone over, I want to point out as to the individual stockholders, the list here of some thirty-five of them—we could go over them individually. I have them in alphabetical order—there is no allegation, no proof, that Mr. Black or Mrs. Black made any representation whatever to Mr. Amen. That just means one as we are going along. I think the evidence here, and I am now speaking just of the stockholders' action at this point, the one that they recover themselves for the cause based on their assertion that they were fraudulently deprived of their stock and should be recognized now by the court as being the equitable owners of that stock.

We have heard a number of them testify. As to a great many of them I think there is no question but what they parted with their stock based on no false representation by anybody. Some of them haven't even testified at all. And for that reason we think that in whole or in part the motion is good. Now, as I say, I am not trying to commingle with two causes. It is not easy for me to keep them always separated but we are here now concerned only with what the individual stockholders ask for themselves immediately, not immediately through some recovery of the corporation which may in the end go back to such stockholders, and as to many of them, I think there is no question at all; as to some of the rest of them I think that the evidence is too

skimpy to base a judgment but certainly as to some of [fol. 953] them, ones who didn't testify at all, there is no evidence in the record that they were fraudulently or otherwise deprived of their stock without their consent, that didn't sell, that they didn't sell of their own free will and volition.

Colonel Walker: May I just make this observation: that the relief in the end of this case the Court may give will depend upon probably a complete review of that and I don't think that we should take the time now to go through this mass as to each of them. That could be done at the time the matter comes up for final argument and relief.

Mr. Miller: If the Court please, I am not trying to do something that I think is useless. There could be no relief for some of them. There could be no relief for those who haven't testified. They could not be recognized as stockholders as of any time since they departed with their stock so far as we have here heard any evidence, without any representation, false or otherwise, by anybody. Now as to those, this is the time to get them out of the case. To feel in the end that you will or will not grant someone relief is the same thing as leaving them there to the end, and see how many shares there are and maybe at sometime or another figure up what each share is worth. As to a large group of the thirty-five there is no possible recovery, and if they can't establish themselves in their corporate cause, I mean in their individual cause of action, there is no corporate cause of action for them, where relief can only be granted to stockholders, not the persons who sold their stock.

It is not that I have any desire to bring something up out of order. I think this is the time when that has to be decided.

Mr. Lucente: Your Honor, if I might make a few observations: so far as the particular stockholders we represent are concerned, there is one individual who has not appeared and testified. That is Mr. McBride. Now, even as to that particular individual whose testimony does not appear in the record, and who is a party by intervention in 3495 and 3509, we do have quite conclusive evidence in this record, first, that he parted with his stock at about the same time

the other people parted with theirs. The stock record shows [fol. 954] that. Secondly, we have Mr. Ives' statement to Mr. Black in the fall of 1944, after all of the stock was picked up, to the effect this is what I told Dr. Wadleigh, I told all of the others the same thing.

Now, I think that is quite conclusive proof that this particular individual, with respect to whose stock there does not appear any direct testimony, was subjected to the same fraud the other individuals were subjected to.

As to the other parties whom we represent, I believe there is evidence in this record, apart from the Ives letter that I referred to, which shows quite clearly that they parted with their stock because of these representations.

Now, there is one group consisting of the wives of some of the individuals who testified. They are named as parties in the intervening complaint. A great many of them were here. They did not testify because their husbands testified and stated that they had handled all of the transactions, that the stock was, most of it, being held jointly, was turned over to Mr. Ives on the basis of these statements, so I think that as to those wives who held stock jointly with their husbands, that the evidence does sustain their claim.

Now I do not, off hand, recall any other categories except one, the one individual has not testified; two, the wives; and three, the persons who appeared and testified personally, that relate to the stockholders that we represent.

Now, Mr. Martin may care to add something.

Mr. Martin: If the Court please, I think that Mr. Lucente's remarks apply with equal force to the Intervenors that I represent. The cases are practically identical and I think what he says is precisely right.

Mr. Siefkin: Let me take up an illustration to make our point clear. Dr. Maud P. Rogers testified. Now, quite contrary to what Mr. Lucente says, Dale Ives didn't tell her the same things that other stockholders said he told them. All Dr. Rogers said was that Dale Ives called her and said that he wanted the stock in, that he had a sale for it at ten dollars a share and she said: do I have to sell it? and he says, if you don't sell it it will become worthless. So she took [fol. 955] it in and sold it for ten dollars a share. Now that is entirely contrary to what any other witness testified to.

It doesn't fall within the purview of any statement in the petition, in any way, shape, form or manner, nor did any one claim that Black made any such statement to Dale Ives.

Now, she can't recover on the basis of that statement; she just can't recover at all.

Take the good lady Hall, when she testified, when she could read her notes she testified to facts. On cross examination she, in substance, repudiated everything that she had said in her testimony. Take Elving, for instance. Elving was the one that sent in four hundred forty shares of stock. Their testimony discloses that Ives said that Elving wanted to sell that stock, that he wanted to get ten dollars a share, and the letter shows that Dale Ives sent it in to Black and Black said here is a man who wants to sell four hundred forty shares of his stock and Black wrote back and said if you want me to take up this stock you are going to have to give me more time; I can't get it in but if you want to leave it with me I will see whether I can sell it to somebody and get the ten dollars a share for it. Now, is he entitled to recover? I say not. I say they fall in three classes; first, those that didn't testify, because you can't rely on a shot gun statement made and, by the way, I think we objected every time that that question came up in Ives' testimony, that "I told everybody else the same thing." It is obviously proven not to be true. I asked to have the time and place specified. It never was. So we have, first, those who didn't testify at all. Second, those that testified and, in substance, repudiated any right to recovery against Ives or Black or anybody else. And, finally, those who were in the case yet who did testify to facts which, under Your Honor's ruling, they are entitled to be heard on to the end of the case, but there are probably half of them that should go out.

Now the only question in my mind is whether or not they should go out now. They will have to go out some place on the line but why carry along plaintiffs who cannot recover in the end, and concerning whom that generally we would have evidence on the other side, but we will have to indulge in the same generalities as they indulged in on the other [fol. 956] side because of the manner in which it came in. Had they specified, been required to either, in taking the

deposition or by this Court, that on a certain day Dale Ives told Hays Hall so and so, instead of just saying blankly I told all the rest of them the same thing, when it appears that that is not true, and with some of these they just wanted money out of the stock and took it. So I think those should go out of the case and go out now.

Mr. Brown: Your Honor, the record of course will show better what Dr. Maud Rogers and these other witnesses did testify to. In the case of Dr. Maud Rogers she was away from Aledo, she was either in Rock Island or later in Canton, Illinois, and she testified that both in 1944 and in 1945 that Dale Ives called her. Now, even if we concede for purposes of discussion that Dale Ives may have said something to her a little bit different from what he said to some of the other stockholders, to use Mr. Siefkin's word, if he said to her I want the stock in, we are selling it at ten dollars a share and if you don't turn it in now it will be worthless and you will lose out on it. If we concede that that is correct, nevertheless, we ask the Court not to lose sight of the more important fact that there was a deliberate plan here, both in 1944 and 1945, to get in half of the stock and that that plan was carried out by instructions, orders and word to Mr. Ives by Mr. Black and that Mr. Ives did tell these people in Aledo for one reason or another that they had to get in, first, fifty percent of their stock, and in 1945 to turn the rest of it in.

Now, if the agent of Mr. Black who was obviously Mr. Ives, happened to vary his story a little bit, particularly when he was talking long distance to Rock Island or Canton, I don't think these stockholders should be penalized, and I ask the Court to consider that, please.

The Court: The motion is overruled.

Mr. Miller: In other words, if the Court please, you feel at this time that there is evidence by each and every stockholder.

The Court: That is correct.

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[fol. 1148]

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W. H. BLACK, testifies as follows:

Direct examination.

By Mr. Siefkin:

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[fol. 1149]

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Q. There has been a lot of discussion about a Petroleum Investment Company here. Do you remember such an arrangement?

A. I do, yes, sir.

Q. And that arrangement, according to the testimony, was worked out between you and Mr. Ives in some fashion?

A. And a Doctor Boyd.

Q. What did that venture do?

A. Well, we were not successful in developing any production out of it, out of these wells we drilled in Illinois.

Q. How many wells did you drill, seven full interest wells?

A. Seven and two participating interests in two wells, and I don't remember just what that interest was.

Q. Those were all dry holes, as I understand it?

A. Yes, sir.

Q. Did you get even a showing in any of those?

[fol. 1150] A. Well, it is pretty hard to tell. Sometimes we thought we had shows and we did some testing but we got no oil.

Q. When then did you come to Kansas from Illinois?

A. I came to Kansas in September, 1939.

Q. Prior to that time had you either individually or with someone else acquired any interests in Kansas?

A. Yes. May I describe how I got them?

Q. Yes, I want you to tell us how that development arose.

A. I met Mr. Marshall up in Illinois and we had a few operations together up there. I think that is where the par-

ticipating interests in two wells that I am speaking of, came from. And he told me a great deal about Kansas, about his living most of his life down here, and some of the successful operations he had had in the years past, and the depression had kinda set him on his heels and he wasn't able to do too much and needed a partner and wanted to know if I would join him in a venture in Kansas and I was to meet him in Tulsa in the spring of 1931, I believe it was in May—I am not sure—May I believe it was. And I was driving through to California and was going to meet him in Tulsa, and I was in an automobile accident and when I came to in the hospital Mr. Marshall was standing there by the side of the operating table.

Q. What date was that?

A. I can't recall the date. I believe it was in May, 1939.

Q. Now, did you and Mr. Marshall form a partnership?

A. Yes, sir.

Q. Was there anything in writing on that?

A. No, sir.

Q. As a result of forming that partnership what did you do and what did he do?

A. Well, he was supposed to go out and get the leases and I was supposed to do the financing.

Q. Did you do the financing?

A. Yes, sir.

Q. And what was the first lease or what were the leases which he secured?

A. The first lease was the Esfeld lease in Barton County, and the Esfeld was a farm-out, I believe from Sohio Oil Company, and we made a deal with some drilling contractors and gave them a quarter interest and I believe $2,500.00 to cut the hole and we were supposed to furnish everything. That was just for the tools to cut the hole and they called themselves the BB&M Drilling Company. I believe it was Bennett, Bronsen and Murmos, and we had [fol. 1151] a three parts interest—we had three parts interest in the well and it was a cable tool hole. I think it took about two and one-half months to cut the hole.

Q. Now did you make that deal with BB&M?

A. No, I never saw BB&M until I got out there in September, after I had gotten out of the hospital.

Q. Mr. Marshall was the one that made the deal?

A. That is correct, sir.

Q. When did you then come out first, when was the Esfeld well drilled?

A. In the early part of July, 1939. It was completed.

Q. It came in as a producer, did it?

A. Yes, sir.

Q. Then subsequent to that time were other leases acquired by you and Mr. Marshall?

A. Yes, sir.

Q. And in whose names were those acquired?

A. I can't remember whether in Mr. Marshall's name or mine or jointly. I can't remember that. I would have to see the documents, sir.

Q. All right. Now will you tell us what those leases were that were thereafter acquired by Mr. Marshall on behalf of the partnership?

A. It is pretty hard to be exact because it was an awful long time ago. I can tell you a few of them and I may skip some. The Esfeld was and the Dolechek, the Hoffman, the Krier, the Weber—now, when I say the Hoffman, Krier and Weber, most of those people had more than one lease. We eventually got several leases from all of those except the Esfelds. I think we only got the one Esfeld lease but there were a series of leases of different parcels.

Q. Now you came to Kansas, as I understand, in September of 1939?

A. That is correct.

Q. Prior to the time you came here did you have any conversation with Dale Ives about——

A. Yes, sir.

Q. You did have a conversation with him. What was that about?

A. About it looked like we were going to be in good shape in Kansas and we were going to find some oil, when we had this one good well, and it looked like we were in a good place to drill a bunch of producing wells and I would be very happy to have him go along. I am possibly a little ahead of my story, if I may say this. That the $2,500.00 that I gave Mr. Marshall, I think that Mr. Ives or Doctor [fol. 1152] Boyd, one sent me $600.00 of that money, but

I had already given him my check and when I told them they wanted in on the deal.

Q. Now was there any agreement with Dale Ives or with anyone else that the Petroleum Investment Company, as such, should transfer its activities to Kansas or operate in Kansas?

A. No. In fact, I didn't know that we were going to operate in Kansas at all until I saw Mr. Marshall and saw what he was talking about. I was on my way to California.

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Q. Now after the Esfeld was drilled it was equipped, was it not?

A. Yes, sir.

Q. And did you receive some money from Illinois?

A. Yes.

Q. From Dale Ives?

A. From Dale Ives and Doctor Boyd. I thought the money was from them.

Q. Well, did you have any indication from Dale Ives as to whom that money came from or who collected it?

A. Not in the early part. I did a couple of months after we received the money, yes.

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[fol. 1154]

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Q. Mr. Black, when we recessed we were talking about the Day and Weber leases. Now there has been something said about a Black Oil Company. Was there such a company organized?

A. Yes, I think there was, Mr. Siefkin. There was a company called the Black Oil Company that was organized by Mr. Ives to take the place of—I mean it was followed [fol. 1155] by the Black-Marshall Oil Company because the Black Oil Company was never used.

Q. Why was a new company organized?

A. Because Mr. Marshall insisted that his name be in the company.

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[fol. 1156]

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Q. Now going down through the month of December and early January, 1940, did you have some discussion with Dale Ives about the organization of the Black-Marshall Oil Company?

A. Yes, sir.

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[fol. 1157]

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Q. Then by the time the incorporation meeting was held in Aledo in January of 1940, what was the situation with reference to the property that was to go into the new company?

A. Well, the properties that we refer to now as the Oil Investment Group—no, the Petroleum Investment Company—were all leases in Illinois and each of these leases we paid no money for the leases. They were all drilling obligations, and the drilling of the well took care of the obligation on the lease for one year. And those leases were never transferred to any company. We agreed that we owned them but we never transferred them because of the expense and effort and after we got to operating in Kansas our operations kept us here and we were doing very well here and we didn't want to spread back and drill any more wells in Illinois. So those leases expired by their own terms and were never transferred into the company because they were very short-lived leases after the Black-Marshall Oil Company was formed.

Q. Now, it appears from the corporate records that at the time of the incorporation there was 122,500 shares of stock, common stock, to be issued?

A. Yes.

Q. And in addition to that 40,000 shares of common stock to Landowners Oil stockholders plus 2,000 shares of preferred stock. Is that pretty much in accord with your recollection?

A. No, sir. There was 20,000 shares of stock that went for Landowners of common stock. They had this thing [fol. 1158] set up on their books at $40,000.00. And we had our preferred stock at $10.00 a share. It seems as though

somebody in the company owed Mr. Bard, one or two of the Bards, around $20,000.00 and our stock, our preferred stock, was $10.00 a share. We figured it ten, and our common stock at $1.00 a share. We wanted Mr. Bard to take all common stock and no preferred but he thought, due to the fact that the company, the Landowners owed him advances up to around $20,000.00, that we ought to give him—we assumed no obligations of the $20,000.00 that was outstanding against the Landowners—so we should give him $20,000.00 worth of preferred stock and 20,000 shares of common stock, that is their group, of which Mr. Bard, I feel reasonably sure, got all of the preferred stock.

Q. Now there was an incorporation meeting held in Illinois, was there not?

A. Yes, sir.

Q. And at whose office was that in?

A. Mr. Dale Ives'.

Q. Prior to that time you had written to Dale Ives the letter which has been introduced as Exhibit 10, and which I now hand you. Do you remember that letter, Mr. Black?

A. Yes, sir.

Q. Now it refers to certain money there that you received from Illinois, is that correct?

A. Yes, sir.

Q. And so far as you know are the figures there given correct as to the money you received from Illinois and such monies as you put in yourself into the company?

A. I think so.

Q. After the incorporation meeting you returned to Kansas, did you?

A. Yes, sir.

Q. And continued with the leasing and drilling program out here?

A. Yes, sir.

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[fol. 1159]

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Q. Now during the year of 1940 did you continue to drill wells in Kansas on leases Black-Marshall then owned or that they thereafter acquired?

A. Yes, sir.

Q. Do you know about how many wells you drilled in 1940?

A. I was under the impression that it was eight, I am not sure.

Q. Were most of those producers?

A. I think all but one or two of them were. I think we drilled two dry holes.

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[fol. 1161]

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Q. Coming back a moment to the Esfeld, was that a very valuable and productive lease?

A. I think the Esfeld is possibly the finest lease we have ever known or the finest least that I know of in Kansas.

Q. Do you know about what it produced as a whole?

A. We were estimating a few years ago that it had made us over a million dollars. That was four or five years ago. I can't remember just how long.

Q. The other leases, the Weber, Dolechek——

A. They were all good leases, very good leases.

Q. Not as good as the Esfeld?

A. I don't think we ever had one as good as the Esfeld. That's my personal opinion and I have never checked up on all of them completely but I have a general idea.

Q. According to a report I have in front of me, which you made on December 31, 1940——

A. May I go back to the Esfeld just for a second?

Q. Surely.

A. We might have had leases, Mr. Siefkin, that have made us more money than the Esfeld because we produced a lot of oil when oil was cheap from the Esfeld. That was one of our first leases. We produced a lot when it was $1.00 or $1.25 a barrel, but I am sure it produced more oil than any lease.

Q. Referring now to what has been introduced as Plaintiff's Exhibit 5, which is a letter which you wrote to the stockholders on December 31, 1941, I note you state in that that on January 3, 1940, you had one producing well, the Esfeld, and one drilling well, Mary E. Weber Number 1?

A. Yes, sir.

Q. And then you say that since January, 1940, you had participated in or drilled six dry holes and twenty-two producers. That would be in the period of two years from 1940 to 1941?

A. Was that to the end of 1941?

Q. Yes, on December 31, 1941.

A. Yes, sir.

[fol. 1162] Q. I will hand you the letter, Mr. Black. The question I was going to ask you was this, Mr. Black: Did the company have the money to finance the drilling, equipping, and producing of those wells?

Colonel Walker: Which ones?

Mr. Siefkin: Those twenty-two I am speaking of?

A. Why, I don't believe the company ever had enough money to complete one well and produce it right and equip it right.

Q. All right, where did you get the money from?

A. Well, I had a little money, as I told you, and I had a little money coming in and I had some connections with some friends who we borrowed the money from.

Q. Where did you first start borrowing the money?

A. We first borrowed our money, the first loan was made with a man, Mr. Murphy, here in Wichita. It was a small loan and it was a bonus loan. We paid him a little bonus I think.

Q. How much did you borrow from him?

A. I think eighteen or twenty thousand dollars.

Q. Did you borrow that from the company's credit or on your own?

A. I would say on the credit of the Esfeld lease, the first one was. I think he is pretty tough to borrow from.

Q. Now subsequent to that time did you start borrowing from the bank?

A. Yes, sir. I started with the Fourth National Bank.

Q. Were you able to borrow the amount of money that you needed on the company alone?

A. No, sir.

Q. How many years did you continue to sign all of the company obligations?

A. To my best recollection, sir, I signed every obligation

with a personal guarantee that the company ever made, whether either through purchases of material, or banks, until we started borrowing money from the Co-op. I think that is right. I would have to check up on that a little bit. It has been so long since I have seen those records I am not sure.

Q. You started borrowing from the Co-op I believe, according to the records, in 1944?

A. I think that is right.

Q. Now your borrowing prior to that time was from the Fourth National Bank in Wichita and who else?

[fol. 1163] A. And the First National Bank of Oklahoma City and the First National Bank of Tulsa.

Q. Were you acquainted with officers of those banks?

A. Yes, sir, they were friends for many years. That is, in the bank in Tulsa. I would say that I met Mr. Kincade after I came to Wichita but he checked me through the other banks, through Mr. Hightower who is the President of the First National Bank in Oklahoma City.

Q. Can you tell us, in round figures, the extent of the borrowing on which you gave personal guarantees for some of those institutions?

A. I would have no idea as to the amounts. I believe one or two of the loans got up as high as a million or more.

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[fol. 1164]

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Q. All right. Do you remember that there was a meeting of the stockholders at the Green Lantern Cafe in Aledo in January of 1941, Mr. Black?

A. Yes, sir, I do.

[fol. 1165] Q. Will you tell the Court, in your own way, how that meeting was conducted, what you said, as you remember, what questions you were asked, what reports you had present; just tell the Court about that meeting?

A. Yes. I can tell the Court a little about that because I was very embarrassed. That was the first time I had ever talked to a bunch of people and I guess I fumbled the ball pretty much because they told me I didn't do too well but, anyway, I tried to tell them that we were, that it looked

like we were on the road to making some money, that our properties had turned out better than I had anticipated or expected, and if we could just stay in there and pitch and could keep those drilling and keep having the luck we were having, it wouldn't be long until we would be able to make some money.

And I have heard a lot of testimony here from these witnesses. They have all told practically the same story and they could be right, that is not exactly the way I remember it, but some of them have said the same thing—they could be right. I thought that I told those people that they would have to go along with us maybe a good long time because the price of oil was cheap and we had so little money we had to borrow all of our money and was doing all our borrowing to operate and that every dollar that we spent in operating and drilling wells was a tax-deductible item and I thought that the more oil wells we drilled the better off we would be in the long-run if we ever wanted to sell out and take capital gain.

Q. You had some charts with you there?

A. Yes, sir, I had some charts. I don't remember what they were, but I do remember having some charts on the wall or a blackboard or something. It wasn't charts. It was a map of our general area out there, see.

Q. Was there a list of stockholders there that was lying on the table?

A. They have all said that. I don't remember it because I wasn't interested.

Q. Do you recall whether or not the roll was called of the stockholders?

A. I don't even remember that, sir.

Q. Now who was handling the legal end and the bookkeeping end of the company at that time?

A. Our attorney, Mr. Ives.

[fol. 1166] Q. Do you know anything about books yourself?

A. No, sir.

Q. Or corporate records?

A. I still know nothing about them.

Q. Do you have anything to do with the minutes or did

you have anything to do with the minutes other than to sign your name to minutes?

A. I guess I sound very stupid but I didn't. I didn't know anything about it.

Q. Did you ever draw a minute in your life?

A. I never drew a minute in my life.

Q. Now after the 1941 meeting did you return to Kansas and continue the operations out in Barton County, the Barton County field?

A. Yes. I might say I believe Mr. Marshall was with me on that trip.

Q. Then there were stockholders' meetings held at Wichita or Great Bend I believe in 1942 and 1943?

A. Yes, I am sure that the next one after that, I am almost positive, was held in Wichita at the offices in Wichita.

Q. Do you remember a meeting held back in Aledo at the Country Club in 1944?

A. Yes, sir.

Q. That has been discussed a good deal here already, hasn't it, Mr. Black, and you heard the testimony on that?

A. Was that 1943 or 1944?

Q. 1944, January of 1944.

A. Yes, at the Country Club, I know.

Q. Now I want to direct your attention to a question often repeated about that. Prior to that time did you ever tell Dale Ives or anyone else that a dividend was going to be declared at the 1944 meeting?

A. I told everybody I ever talked to that as far as I was concerned there was no way in the world we could pay a dividend. I had a lot of pressure put on me by quite a number of them about a dividend and I said they would have to show me how we could pay it. I didn't know how we could possibly pay it.

Q. Now do you remember your talking to the people at the Country Club at that meeting?

A. Yes, sir, I do.

Q. I wish you would tell the Court, in your own way, what you recollect of that meeting, what you said?

A. I can remember a good deal more about that meeting than I could the other because I had gotten a little used to the procedure at that time.

[fol. 1167] Q. All right, tell us in your own way what you remember being said, what you said, what others said, and what was done there?

A. I tried to explain first what we were up there for and I think we called the meeting to order and I think we tried to explain that we were up there to go over the operations of the company with our stockholders and associates, and try to outline too what we had done up to date and what our future prospects were.

I also said that I had heard so much about a dividend after I had gotten up there and found that so many people were anticipating a dividend that I would have to say right then and there that I could see no way in the world that a dividend could possibly be paid.

And I explained why a dividend could not be paid. I says, we are, in my opinion, making money, that our books do not reflect it because of our intangibles and depletions and the advantages that we had through this drilling operation, tax-wise. That if they wanted me to stop drilling these wells, which I figured that every time we spent a thousand dollars drilling an oil well it would possibly make us five or ten thousand dollars in returns, if it was a producer, but if they insisted that we did not continue on this drilling program it would be possible to pay dividends, but, in my opinion, we would be losing at lease seventy-five to eighty percent tax advantages by stopping our drilling operations. And I also explained that the cutting of the hole, that the drilling of the hole, was not capitalized; that we were able to charge that off, the complete cost of drilling the hole. The only thing that we had to capitalize was the physical assets that we put on top of the ground, such as tanks, and pumps and so forth, and I believe, I thoroughly believe, that everyone understood that and I thought that they all agreed that that was a very fine program to go on.

Then later I said the only way—they had heard so much about money and everybody wanted a dividend or money in some form—they had proposed loans and selling stock and everything else—and I am going to have to differ a little bit with every statement I have heard here. I never

[fol. 1168] told anybody that I had a ready market for that stock. I told them I thought that I could find a market for the stock at $8.00 a share and if they would give me time enough I would come back and explore it and see if I could work it out.

Then somebody proposed a motion and I couldn't remember that it was Mr. Blazer that read it but it possibly was Mr. Blazer that read this motion, setting out that if they wanted to sell their stock that I felt that I had a buyer or could find a buyer for this stock at $8.00 a share but, in my opinion, they would be making a mistake to sell this stock because I felt it was worth money then and would be worth more later, I believe more.

So that, as I remember, that motion was not even passed on. Somebody got up and made an amendment to it and the amendment was, why can't we sell the producing properties to get us $8.00 a share and keep the Landowners Oil Association, or any unproducing properties that we might have. I said, all right, I am willing to try that but I must insist that what you mean by undeveloped acreage might be a lease, a half section or a quarter section with one well on it. Would you say that the rest of that property was undeveloped or would that property go with the developed property?

So then they decided, as I remember, that I was to sell the producing properties or any of the undeveloped properties necessary to make a sale, whereby the stockholders would get $8.00 per share for their stock, and we were to keep the Landowners Oil Association, or any other undeveloped leases that was not necessary to go into this sale.

Now, I was to come back and explore it and see what I could do. They also say that I was to report back to the stockholders. That is not my recollection. I was to report to the directors of the company instead of the stockholders. That is my recollection of that meeting.

Q. All right. Now, do you remember telling them that you were constituting Dale Ives as your agent to act for you in all matters?

A. I expect I did, because everybody—they were all wanting information from time to time, day after day, [fol. 1169] and I said I just can't possibly—we had such a

small organization—I believe the first two years we didn't even have a secretary. I think pretty near all the letters we had—the girl could type but she couldn't take dictation—and I think most of the letters we just had to write in longhand or use a telephone, and I believe, I might have told them that, sir.

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[fol. 1170] Q. Did you return to Kansas after that meeting?

A. Yes, sir.

Q. Did you make efforts to sell the properties?

A. I certainly did.

Q. Who did you——

A. You mean who did I try to sell them to?

Q. Yes.

A. So many people I would hate to try to tell you.

Q. Well, can you name some of them?

A. Yes. One of them was a company down at Houston. I believe it was called the Gulf Coast Oil Company, of which Mr. Ed Bradley there was associated or some of his relatives in it. That was one. Quite a few of the brokers—we had lots of brokers from Fort Worth and Chicago and all around came down, they heard we wanted to sell it and tried to buy it. We had one we thought very likely purchaser from Illinois called the Central Pipeline Company of Illinois. They were down here and spent quite a few days. I also had Mr. Herschell Blazer's brother's company, called the Ashland Oil Refining Company. They sent their representatives out and spent quite a long time with us. The Sohio Oil Company sent their engineers out and spent days and days in the field. We had everybody that looked like a prospect.

Q. Do you remember the Atlantic, among others?

A. Yes, I had forgotten. We had the Atlantic.

Q. Do you remember Stanolind?

A. Yes, sir. I couldn't think of anybody that was a prospect that I didn't contact.

Q. Were you able to secure a purchaser for the properties?

A. No, sir.

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[fol. 1171]

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Q. Now during 1944 was there any occasion that arose where you felt that you could complete a sale with any possible purchaser?

A. During 1944?

Q. Yes.

A. Oh, yes, we could have made some kind of a sale but we couldn't get enough to get $8.00 a share out of it.

Q. I am referring particularly to the testimony of Dale Ives at some time in 1944, perhaps in the spring or perhaps in the summer, he stated you called him and told him that you thought that you had a sale that might go through?

A. I think that is right. I think I did tell him that.

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Q. Do you remember when it was, Mr. Black, what time in the year?

A. No, I can't. It seemed to me like it was in the summer. I am quite sure it was in the summer time.

Colonel Walker: Of 1944?

Mr. Siefkin: Of 1944. I don't know what time. No one seems to be able to fix it.

Q. Now, subsequent to that time did certain of the stockholders and Dale Ives send stock in to be purchased or retired?

A. Yes, I think we had the stock, a lot of the stock sent [fol. 1172] in before we even came close to making a sale, just wanted to have it there in case there was a chance to sell it.

Q. I am not referring to 1945 now.

A. I, too, am talking about 1944.

Q. All right. Do you think some of the stock was sent in?

A. Yes, sir, before we even thought that we had a sale.

Q. How close did you come to making a sale?

A. Well, that is pretty hard to say. I really thought we had a sale made and just in the last few hours why it blew

up right in our face and the purchasers all packed their bags and went home.

Q. Who was negotiating for the sale at that time?

A. I was negotiating with the Co-op in Kansas City, the National Co-op.

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[fol. 1173]

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Q. All right. State what the facts were with reference to how that stock came in or why it came in to you?

A. Well, it came in to be sold. Now—that is a hard question for me to answer, sir—whether or not that stock came in because they felt we were making a sale or they didn't care whether they wanted to sell their stock or not, it would be hard for me to answer. I think the people thought we were going to sell the company and that it was all for sale.

Q. Did you at any time tell Dale Ives that you had sold the company in 1944?

A. I never told him that, sir. I told him I was so disappointed that we couldn't sell.

Q. Now going down to 1945, did you again endeavor to make a sale of the company?

A. Yes, sir.

Q. And did you go through a number of companies at that time or did you concentrate on one?

A. In 1945 we added up with the Shell and the Cities Service, at the same time we were dealing with the National Co-op, sir. They had all of our statements. They had looked our properties over and we thought out of one of those three that we were definitely going to make a sale in 1945.

Q. Now can you tell us about when those negotiations were going on, Mr. Black?

A. Well that, too, I believe was in the summer of 1945.

Q. With reference to a loan of $3,200,000.00, which the records show was made on October 4, 1945, can you tell us about how long prior to that time you started negotiations and about when those negotiations for sale ended?

A. Well, I think we had been negotiating on this sale—we were talking about the National Co-op now?

Q. That is right.

A. I think it was several months. Those people, I mean the National Co-op, knew a lot about our properties up to that time and we had been selling some oil. When we first started talking to the Co-op we couldn't sell them any [fol. 1174] oil because our connections were all frozen by an order from the Government that we could not make any connections that were made as of a certain date and most of our connections at that time came under that freeze order of the Government. So that we couldn't change. We were selling our oil to Phillips then and the Co-op thought that they could go to Washington and get this freeze order released so that we could sell them the oil and they found out they couldn't.

The Cities Service told us if we would let them have the oil that they could get the connections changed. Well, in order to get out of that position that I was in with the frozen connections, I told the Cities Service that they could have the oil if they could get the connections and they did get them and I sold them the oil for several months and then I was free to do business with whom I chose.

Q. You think it was several months at least prior to October, 1945, that these negotiations with Co-op were carried on?

A. That is right.

Q. Were appraisals made?

A. Yes, there were a number of appraisals made.

Q. And were engineers on the property?

A. Yes.

Q. Taking physical——

A. We almost lost all of our crews out there because there were so many people out there to buy the property.

Q. Did you think you had reached a deal on that?

A. Yes, I thought we had definitely made a deal with the Co-op.

Q. Did you so tell Dale Ives?

A. Yes, sir, and I can tell you, in my opinion, what blew the deal up and of course that is just an opinion.

Q. Well, did you tell Dale Ives that you had made a deal

or that you thought you could make a deal; what did you tell him?

A. I told him I thought we had a deal made and as soon as I knew I would get in touch with him and have him come down. I mean, if the terms were ever agreed upon then I would have him come down and we would close it up, sir.

Colonel Walker: What was the date?

Q. That was about when, Mr. Black?

A. That was just a few days prior to this loan. Now the date of the loan would not be correct because it took [fol. 1175] some time to draw those papers up but the agreement on the loan, it was just a few days before that, sir.

Q. All right. Now, what was the purchase price you were talking about at that time?

A. Well, I am confused, I will have to admit. I was talking about this other sale at five million dollars. It was this sale at five million, in 1945. It was five million dollars.

Q. And at that time you owed, as I remember it, two and a half million dollars, or a little more, is that right?

A. Something in that neighborhood, sir.

Q. Were you able to close a sale on that basis?

A. No, sir.

Q. Why not?

A. Well, they got three or four different reports. At the time of the sale, the sale was talked about, I don't remember how many reports they had. I know they had two or three but they had one that was made by their own engineer or geologist. I think his name was Delmar Powers. I never saw that report but I was told by Mr. Hatcher, and Mr. Mary later, that his total recovery, his estimate of the total recovery of the property was less than we were asking for the sale price, and that, of course, he being their geologist, they could not purchase it with that report.

Q. Now in any event you know the sale fell through. Then what did you do?

A. Well, I was very disgusted and I remember I was working one night up at the office trying to figure out how

in the world we could approach somebody else and I knew how badly that the Co-op—they were very frank with me about how badly they needed the oil to run the refinery—and I thought that I could make a deal with them where I could borrow enough money to take care of the obligations because so many people had thought that this was a commitment that we had a sale made that wanted to sell their stock, that I called Mr. Hatcher on the 'phone. He had gone back to Topeka and Mr. Nolan had gone back to either Minneapolis or St. Paul, some place up there where he lived, and most of the Directors of the Co-op had gone home, and I said I have got a deal that I believe will suit you better than a sale and I think we can live under it ourselves, at least, I am willing to take a gamble on it and try it. I said, [fol. 1176] "If you will loan us $3,200,000.00 we will give you a complete mortgage on all of our properties; we will make a long-time contract with you, and we will continue to try to develop and find more oil that will give us all the working capital we need, provided, you will go through on the same schedule of giving us $22,000.00 for each producing well, and I think that we can, if your company will do that, I think that we will be in a position to go right on with our development program in the way that I think would get some big results." And he says, "Well, that sounds very good to me." He says, "I will get in touch with some of the Directors and I will call you back."

I think he called me back within an hour. And, he says, "It sounds like you have got something there that we can work out and I have asked some of the Directors to come back to Kansas City or meet me in Topeka—" or I am not sure which, but anyway they were to get together and the idea seemed to catch on very well. Then, from then on it was a question of negotiations on the loan of how tough they were to be able to tie me up and what I could operate on under that loan.

Q. In any event, these oral conversations you have spoke about culminated in the loan agreement for $3,200,000.00 that has already been introduced in evidence?

A. Yes, sir, plus $22,000.00 for each additional well.

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[fol. 1182]

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Q. When we recessed, Mr. Black, I think we were talking about 1945. After the $3,200,000.00 loan was given to the corporation did you drill a great number of wells?

A. Yes, sir, but I couldn't tell you how many.

Q. As a matter of fact, wasn't a computation made showing that in the following eighteen months up until July 1st, there was something like two hundred two wells drilled?

A. That is my recollection, yes.

Q. And of that number about one hundred seventy-five were producers?

A. About three out of four were producers.

Q. And in the interim did the price of oil substantially increase?

A. Yes, sir, it did.

Q. Now, going on through 1946 and 1947, when were negotiations again opened for the sale of the corporation or its stock?

A. Well, it was in 1947. I don't believe we discussed it in 1946, I don't recall it.

Q. Now in the interim had you reached a pretty high level of production in the wells?

A. Yes, sir.

Q. Had you reached a point where it was no longer advantageous or wouldn't be for much longer to continue to drill and take the tax deductions?

A. Well, I would say that is very debatable. In my opinion, it was, because we had drilled what I considered the most likely properties that we had.

[fol. 1185]

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Q. Now, I spoke a minute ago of the negotiations for sale, reopening with the Co-op. That was sometime in 1947, was it?

A. Yes, sir.

Q. And who did you deal with at that time?

A. Mr. Hafcher and Mr. Mary and quite often Mr. Cave was present.

Q. Mr. Mary was who?

A. He was the manager. I understood that he was the manager of the Co-op and Mr. Hatcher was the chief counsel.

Q. Mr. Mary is no longer alive, as I understand?

A. That is correct.

Q. Mr. Cave is the gentleman who testified here yesterday?

A. Yes, sir.

Q. When you opened your discussions on the possible sale at that time was there any discussion with reference to the sale of assets as such?

A. There could have been. I wasn't too familiar with that. There could have been but as soon as we looked into it and talked with some tax people we found we couldn't make a deal on that basis.

Q. Then after that time was there a written contract [fol. 1186] drawn up by Mr. Pielsticker and signed by Mr. Mary?

A. Yes, sir.

Q. Did you or Black-Marshall ever sign that?

A. We did not.

Q. Now that contract, as I understand, provided for a sale of all of the stock or substantially all of it?

A. I think that is correct, sir.

Q. Was that deal subsequently changed?

A. Yes, sir.

Q. And do you know what percentage was to be sold or how much was to be sold or how it was worked out?

A. I do know now. I mean I have been refreshed on it. It was something like seventy-six percent, the block of stock that Mr. Ives and myself had, they wanted to buy outright.

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[fol. 1189]

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Q. Do you remember what conversations you had with Dale Ives in 1945 with reference to a possible sale of the company or its assets?

A. Well, I talked to him I am sure at least once daily

while we were working on that thing, either on the telephone or he was down to see us, and we thought we were going to make a sale. At that time we were—I was not particularly sure about any form of making this sale, whether it was going to be assets or stock. I was not familiar with any of the ramifications, the ramifications or the tax ramifications of whether or not we would sell the [fol. 1190] properties. I always refer to it as selling the company. Now whether that meant stock or property, I was not familiar with the legality of it and I wouldn't know, sir, but I know that as soon as we found out and looked into the matter I definitely found out that I could not sell anything but my stock.

Q. Well now, after you were turned down by the Co-op on that deal, did you tell Dale Ives about it?

A. I certainly did, sir.

Q. And did you also write to Allen James as part of your letters of August of 1945?

A. Yes, I had forgotten that but since I have been in this trial I have seen the letter that I wrote but I had forgotten about writing him.

Q. Now, in your judgment, what was the fair and reasonable market value of all of the assets of Black-Marshall Oil Company in September or early October, 1945?

A. My appraisal of it might be entirely different from other people. All of our partners, and when I say partners, all of our associates and the people in whom I had confidence, wanted me to sell my stock. They wanted to sell theirs. They said they thought we were getting a tremendous price for it if we could get twelve or fifteen dollars a share for it, and the principal reason that Mr. Kincade and some of the other people whom I had a lot of confidence in was so sure that he should sell it was because I had tied myself up in this contract, which I knew I had done. I guaranteed to drill sixty producing oil wells in that loan agreement——

Q. Just a moment, Mr. Black. We are a little off of the question. Do you have an opinion of the fair——

A. Of the valuation?

Q. Yes, valuation in September or October, 1945, as it then existed?

A. Would you mean to liquidate it, sir?

Q. I mean to sell it to a willing buyer who was willing to buy from a willing seller who was willing to sell?

A. We had tried to sell it, as I told you, for five million dollars and we couldn't find a buyer. Now what that would amount to in value, I couldn't say, sir.

Colonel Walker: I think we will object to any further questions from this gentleman as to value because I think the appraisals which he or the company had made are in evidence.

[fol. 1191] The Court: Overruled. I think if he has an opinion, he is a defendant in the case, and if he has an opinion about the value of the property I believe he would be entitled to give it.

A. My opinion of the value of the property was that we should get around five million dollars for the total assets, all of the stock of the company on that basis.

Q. Well now, the loan that was made was $3,200,000.00?

A. Yes, sir.

Q. So that would leave an equity of $1,800,000.00?

A. Approximately, yes, sir.

Q. Were you able to sell it to anyone at that time?

A. No, sir.

Q. For as much as five million dollars?

A. No, sir.

Q. I notice in some of your letters that you indicate that you would be willing to take $12.00 a share?

A. That is exactly right, sir.

Q. And you would have taken that?

A. I would have offered it for that, yes, sir, and I would have possibly taken ten.

Q. Now on and after the time the loan was made, all of the Aledo stockholders were out of the picture, were they not?

A. Well, I assumed so. I am not sure. I don't know all of them. Mr. Siefkin. They were all Mr. Ives' friends and not my friends and he wanted them all out. He said that he wanted to get out.

Q. Now at that time you had obligated yourself or your company to drill how many wells?

A. We obligated ourselves, under the loan agreement, to drill a minimum of twelve producing wells a year for five years, or sixty producing wells in the contract.

Q. Now had you drilled as many as twelve or fifteen dry holes the first year, what would have happened to the company?

A. Well, it wouldn't have been so good but we would have possibly survived it, but I don't know. It would have been very doubtful.

Q. Well, was it due to the successful operation and the increased price of oil——

A. Yes, sir, it had to be. It couldn't have been anything else because we more than doubled our production. In fact, I think we about trebled our production after 1945 and the price of oil went from $1.25 to I believe $1.85 or [fol. 1192] ninety cents, something like that, during that period. And we had the same operating overhead expense with the large operations as we had with the small ones.

Q. The facts are, if you could make money with getting $1.25 for oil——

A. Even with the same oil.

Q. —you could make considerable more money at $1.70?

A. The rest of it would certainly be profit.

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[fol. 1193]

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Q. Now there was something like 65,000 shares all told that was purchased, as I remember it, and held as street stock in your lock box or the company lock box?

A. Yes, sir.

Q. Was that eventually retired?

A. I don't know how much, sir. I mean how many shares, but that block that we had was eventually retired.

Q. It was all retired but the 11,714 shares?

A. That is correct, sir.

Q. And on your ledger account known as the W. H. Black stock account, that stock was all charged to you, was it not?

A. Yes, sir.

Q. I believe originally it was charged to Dale Ives and then transferred to you, was it not?

A. Yes, I don't know if all of it was charged to Dale Ives but a certain part of it was. I don't remember what the figures were.

Q. Now do you know why it was that that stock was not retired prior to June or July of 1947?

A. Yes, I certainly do.

Q. Why?

A. We could never get together with our auditors and Mr. Ives or any attorneys that we talked to around here on whether or not we should retire it or put it back in the treasury of the company. There was quite a lot of discussion and difference of opinion as to whether or not the company had a right to retire it or whether we had a [fol. 1194] right to put it back in the treasury and we didn't know what to do with it. I never did know what to do with it until we finally got some decisions that we thought we could handle it.

Q. Now outside of the 11,714 shares of stock, did you ever claim any ownership in any of the rest of that stock?

A. I never did, sir.

Q. Now as to the 11,714 shares of stock, that was transferred to your name in August of 1946, was it not, Mr. Black?

A. Yes, sir.

Q. Can you tell us why that was done?

A. Why it was transferred to my name?

Q. Yes.

A. Well, I had agreed with Mr. Hatcher of the Co-op that I would buy that stock myself.

Q. Why?

A. Because he wanted me to have enough control that the loan would stand up. He later told me after we became pretty good friends that he figured that when they made that loan that they were buying the company and we would never be able to operate under it and he wanted his contract to stand up.

Q. Did you have any other reason or purpose in buying that stock than that?

A. At that particular time I thought it was all right, of course, but that was the principle reason for it.

Q. Well did you have any other purpose than that?

A. Well, I don't know that I did.

Q. Was there any reason why, if you wanted to do it, that you couldn't have taken the other 56,000 shares at the same time?

A. There was no reason in the world.

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[fol. 1196]

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Q. Going down now to 1947, the stock which was sold. You received your money by check for that stock, did you not?

A. Yes, sir.

Q. There was certain money withheld?

A. That is right.

Q. And that was placed in escrow in the bank?

A. Yes, sir.

Q. And some of that still remains there until this date?

A. Yes, sir.

Q. And do you know what proportion per share that was, Mr. Black?

A. That we left in escrow?

Q. Yes.

A. I couldn't say. It was quite a considerable amount of money but I can't tell you what proportion it was.

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[fol. 1197]

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Q. Was there some discussion about three items that were involved of Black-Marshall property which did not go to the Co-op?

A. Yes, sir.

Q. What were those items, please?

A. One of them was some gas wells in Western Kansas, and the Landowners Oil Association, a Beechcraft airplane and a couple little small wells over in Texas.

Q. Now, did you have any particular desire to have any one of those assets yourself?

A. No particular desire at all, sir.

Q. Did you take them all?

A. Yes, sir—I might tell you this: In the interim while we were making the transactions on the account of the valuations that I had had on these different properties, why I told Mr. Hatcher that if they didn't think they were worth what we had them for I would take any of them on the values we had on them.

Q. All right, you did take then the stock for the Landowners?

A. Yes, sir.

Q. You took the Beech airplane?

A. That is right.

Q. And you took the gas wells in Western Kansas and the oil property in Texas?

A. Yes, of which the company had a half-interest.

Q. What did you pay for those? I don't mean in dollars, I mean what basis was it?

A. Well, I thought we were buying them at book value, sir, except that I remember very distinctly that there [fol. 1198] was one item on there, the Landowners Oil Association, on the book value was $40,000.00. We had always carried it at that. And I find in the final settlement that I paid fifty-two thousand and some odd dollars for it.

Q. Now you still have the stock in Landowners Oil Association, do you?

A. I do.

Q. There has been introduced a series of letters which you or Mr. Pielsticker exchanged with Mr. Ives with reference to that property. Do you remember that correspondence?

A. Yes, sir.

Q. Did you also have some conversations with Mr. Ives concerning it?

A. Quite a few, sir.

Q. So far as you are concerned are you willing to turn over the stock of the Landowners Oil Association to these

former stockholders of Black-Marshall or anybody else that wants it for the investment you have in it?

A. Yes, sir.

Q. And you also have been willing to do that?

A. Yes, sir.

Q. Since 1947?

A. Yes, sir.

Q. Now what happened to the gas leases and the little well or little oil property in Texas?

A. The little oil property in Texas, sir, has been sold or liquidated and I have no further interest in it at all. The gas wells, you understand these gas wells that we are talking about, the company only owned a half interest in those wells. They were owned by the Sinclair Oil Company. We still have those. The airplane I do not have any more but I do have the Landowners and the gas wells.

Q. All right. Have you, over the period since June or July 1st, 1947, made considerable advances to the Landowners for defense of litigation on these Kansas leases?

A. Yes, sir.

Q. Still in litigation, as I understand, there is still litigation in that company?

A. Yes, sir.

Q. Have you yourself ever received one penny in dividends from that company?

A. I have not.

Q. It has been a one-way street as far as you are concerned?

A. Yes.

Q. You are willing that they have them if they reimburse you for the actual investment?

A. Yes, sir. May I go back on this Landowners just a minute, sir?

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[fol. 1201]

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Q. Now the stock was purchased in 1945, Mr. Black, was purchased with Black-Marshall money, was it not?

A. In 1945?

Q. Yes.

A. Yes, sir.

Q. And some in 1944?

A. Yes, sir.

Q. But practically all, if not all, in 1945 was purchased with Black-Marshall money and the stock purchases charged to the W. H. Black stock account?

A. I think that is right.

Q. Now did any attorney and particularly did Dale Ives ever advise you that such course of action was illegal?

A. No; he told me that is the only way we could do.

Q. Now on the stock that was received from the Aledo group or that was given, I mean, to the Aledo group in the inception, who had to do with the assignment of that, who determined who got what stock in the Aledo group?

A. That was worked out by Mr. Ives and it was quite a few months before we knew how much stock had been issued to them or even how much money they had put in, and I don't know, I didn't know for a long time—possibly several years—and I still don't know why he issued $10.00 pre- [fol. 1202] ferred stock on the basis of $4.00 a share. I have never been able to understand that. He has never explained it to me and I still don't know.

Q. Well, did you know actually, until long after the time who put up money back there?

A. No, I didn't know until several months after the company was organized.

Q. Now what interest did Dale Ives have in the company at the time it was finally dissolved?

A. I think he only had 3,000 shares, I believe.

Q. Were those owned by him personally?

A. I don't believe—No. I think—he was the guardian for the children I believe in the Boyd estate.

Q. As a matter of fact, he only had thirty shares, didn't he, Mr. Black?

A. I don't know. I don't know where the thirty shares come from.

Q. He disposed of some of his stock in January of 1947, did he not?

A. Yes, sir.

Q. You and Mr. Huff got that stock?

A. That is right.

Q. Now that grew out of an Aledo Oil Company transaction?

A. That is right, sir.

Q. Will you tell the Court, in your own words, what that transaction was and how it worked out?

A. Well, the group in Aledo wanted to start another oil company after they had sold their stock and wanted me to help them to get it started. And they wanted me to have, I believe, a one-eighth interest and Mr. Huff to have a one-eighth interest in it. So we agreed to try to help them get started and we found, after we had been in there awhile, that it wouldn't work.

The Court: When was that, Mr. Black?

A. Sir, I believe it was in 1946. I am quite sure it was in 1946.

The Court: All right, go ahead.

A. But I am very vague about time. I can't remember the dates without something to tie it in. So we told them that we would try to help them get started. We saw after we got started, Mr. Neely was also working for them, and he was working for us, the Black-Marshall Oil Company. It became so confused so early that we had to withdraw [fol. 1203] from it and we told Mr. Neely that he would either have to work for the Aledo Oil Company or for the Black-Marshall Oil Company and Mr. Ives said, "Well, if you want to withdraw, if you want out, I will be glad to trade you and Mr. Huff a certain number of shares," and I don't remember how many, "for your interest in the Aledo Oil Company." I don't believe it was Aledo Oil Company then but it was that group. If it was Aledo Oil Company I never had any stock.

Q. In any event, you did secure Dale Ives' stock?

A. Yes, sir.

Q. For whatever——

A. Whatever the interest might have been.

Q. And so far as you know that was the last of the stock that he had?

A. I thought that was the last of Mr. Ives' stock.

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[fol. 1207]

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Q. Now I want to go back for just a moment to the Petroleum Investment Company matter. Was it your idea when you started operations in Kansas that you were operating as the Petroleum Investment Company?

Colonel Walker: Now just a moment. To which we object as to w at his idea was. Let's have the facts.

The Court: Well I presume the answer to that question, in answering the question, he will be stating the facts as he understands them.

A. I did not.

Q. Did you tell anybody that you were just lifting the Petroleum Investment Company operations from Illinois out to Kansas?

A. No, sir. The fact of the matter is I had forgotten entirely about even the name of it because those receipts that these gentlemen have and these people have were not given to them by me. Those things were prepared by Mr. Ives and I signed them and left them with him in blanks.

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[fol. 1209]

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Cross examination.

By Colonel Walker.

Q. Mr. Black, you have testified numerous times in connection with legal proceedings, haven't you?

A. I beg your pardon?

Q. You have testified numerous times in connection with legal proceedings?

A. Very few times, sir.

Q. Well, you gave your deposition in the Blazer case, did you not?

A. Yes, sir.

Q. You testified in this very Court Room in the Blazer case?

A. Yes, sir.

Q. You have answered Interrogatories in this case under oath, signed and sworn to them and they are on file here, haven't you?

A. That is correct.

Q. And you are now testifying?

A. Yes, sir.

Q. And it is unnecessary to ask you if you do understand the nature and the seriousness of an oath?

A. I certainly do, sir.

Q. You have just testified under oath before this Court that in the fall of 1945 that the stock of Black-Marshall, in your opinion, was not worth more than $10.00 and you would have been very happy to have sold yours at $10.00. You testified to that, in substance, not thirty minutes ago, didn't you?

A. That is correct.

Q. You say that is correct?

A. Yes, sir.

Q. I now call your attention to the fact that in the fall of 1945 when you say that stock wasn't worth but $10.00 a share, you were buying thousands of shares and paying $17.50 a share with company funds, weren't you?

A. If I may—may I——

[fol. 1210] Q. Just answer yes or no.

A. I am sorry, I thought you were talking about 1944, sir.

Q. Mr. Siefkin asked you specifically about 1945 and you gave an opinion as to the value of the company at five million dollars in 1945, in October, I believe.

A. That is right.

Q. And isn't it a fact that when you say that this stock wasn't worth but $10.00, you would have been very happy to have sold yours, that you signed a resolution and the minutes of a Board of Directors' meeting which was held on the 28th day of June, 1945, wherein you were authorized

on behalf of the company to purchase all outstanding common stock of the Black-Marshall Oil Company that is available or offered for sale at $12.00 per share?

A. That is correct. That was after the loan was made. I was talking prior to the loan.

Q. And isn't it a fact that shortly after the 28th day of June, 1945, when you were authorized to pay $12.00 a share for stock that you held a meeting in September of that same year and you attended as a Director and as the President of this company and the Chairman of the Board of Directors and didn't you sign a resolution that you were authorized to loan, not to exceed $12.00 a share, and to purchase stock up to $20.00 a share for your company?

A. That is correct.

Q. And you still want to tell the Court that that stock wasn't worth but $10.00 a share, do you?

A. I am talking about before we made the loan when we were trying to sell the property.

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[fol. 1218]

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Q. Mr. Black, I understood you to tell Mr. Siefkin you were fifty-four years of age?

A. Yes, sir.

Q. And you detailed that most of your life you had been in the oil business. What schooling did you have?

A. I had very little schooling, sir.

[fol. 1219] Q. When did you get in the oil business?

A. When?

Q. Yes, sir.

A. In 1919.

Q. With what company?

A. With no particular company. I worked for the Texas Company for a short while.

Q. In what capacity?

A. In leasing.

Q. Getting leases together?

A. Yes, sir.

Q. About how long were you with the Texas Company?

A. I think altogether, I was with them twice, I believe about a year and a half.

Q. Working on a salary or commission?

A. Working on a salary.

Q. Now when you left the Texas Company you didn't have any substantial amount of funds accumulated then, did you?

A. I did not.

Q. Who did you go to work with next?

A. I was out trying to get oil properties together, leasing and royalties, leasing mostly in those days.

Q. For whom?

A. Myself and others.

Q. And how long did you work as an individual?

A. Well, practically the rest of my life.

Q. Well, didn't you say you had done some work for some other companies?

A. In leasing, yes, but not on a salary.

Q. And where were you employed, say, about 1930?

A. In 1930?

Q. Yes, sir.

A. I think I was in Oklahoma City in 1930.

Q. What were you doing in Oklahoma City?

A. Trading in oil and gas leases, royalties.

Q. What other business did you have in Oklahoma City in the early 1930's?

A. I was, for a while, with A. J. McMann and Company.

Q. You worked down there as a stock broker, didn't you?

A. Yes, sir, stocks and bonds for a while.

Q. You were a licensed dealer in stocks and bonds, you had to have a permit?

A. I don't believe I did.

Q. Now, may I refresh your recollection by asking you if you were not licensed as a salesman for the A. J. McMann and Company of Oklahoma City along in the years 1932, 1933 and 1934?

A. No.

Q. You say that you were not?

A. I was not that late. It was earlier than that, sir.

[fol. 1220] Q. Well, when did you say you were working as a——

A. I think it was in 1930 and 1931, sir.

Q. Now, they handled bonds and securities, didn't they?

A. That is right.

Q. And you became familiar with stock issues and bonds and those matters, didn't you?

A. Only bonds. We had no stocks.

Q. Now, what did you do just before you went into this stock brokerage business with McMann?

A. I came from Louisiana, from New Orleans.

Q. What had you been doing down there?

A. I had been trying to drill a well on the Delacroix Island.

Q. And you came from Louisiana and went in with McMann for awhile?

A. Yes, sir.

Q. And where did you go after you left McMann?

A. I went to Denver.

Q. What did you do out in Denver?

A. I did the same thing.

Q. That is, oil and gas leasing?

A. Oil and gas and royalties, yes, sir.

Q. You had some difficulty out there with the authorities, didn't you, while in Denver?

A. I did not.

Q. I may be misinformed.

A. You are.

Q. But weren't you arrested or indicted there?

A. I was not, sir.

Q. You never were?

A. I never was.

Q. Either there or any place else—I am just asking you if you were arrested or indicted now in connection with either mail fraud or conspiracy of any kind?

A. Yes, I was.

Q. You were?

A. Yes.

Q. And where was that, Mr. Black?

A. It was in Houston.

Q. In Houston. In what year was that that you were indicted for conspiracy?

A. That was, I believe, in 1921, I believe.

Q. And was that in connection with oil and gas leases?

A. Yes, sir.

Q. Well, I don't care to go into a lot of unpleasant things, but I was coming forward from McMann and then you went to Denver and you handled oil and gas leases in Denver, did you?

A. Yes, sir.

[fol.1221] Q. Then where did you go, Mr. Black?

A. I went to California.

Q. And doing what work, sir?

A. I was handling a little real estate in California. I had lived there before. And I was only there a short while and I came back to Oklahoma and we went up to Nebraska and Illinois.

Q. Now, when you went to Denver and worked there a while, went on to California and worked awhile, neither of those ventures were successful, were they?

A. That is correct.

Q. And so you came from California to Illinois?

A. To Nebraska, sir.

Q. To Nebraska first. How long were you in Nebraska, sir?

A. Well, we drilled a well near Falls City. We drilled an original well there, the first well, with Mr. Garland, the Damon Corporation.

Q. And that venture was not financially successful, was it?

A. No, it was not.

Q. Did you go from Nebraska then to Illinois?

A. I did.

Q. And you got to Illinois along in either late '37 or early 1938, didn't you?

A. Yes, sir.

Q. After you got to Illinois you went around and dealt with some people up there as the Arab Petroleum Company, didn't you?

A. That is right.

Q. And you dealt with individuals as though you were incorporated and, as a matter of fact, you were never incorporated there at all, were you?

A. In Illinois?

Q. Or any place else?

A. I think the Arab Petroleum Company was incorporated.

Q. Where?

A. In Oklahoma, I think.

Q. When?

A. I didn't own it.

Q. Well, after you had been in Illinois a while you became acquainted with Dale Ives?

A. That is right.

Q. You knew that he was an attorney at Aledo, Illinois?

A. Yes, sir.

Q. You learned that he had a pretty good reputation and standing in that community, didn't you?

Q. I did, sir.

Q. You learned that people had faith and confidence in Dale G. Ives?

A. Yes, sir.

Q. That he was a man of standing in his community, is that right?

A. That is right.

[fol. 1222] Q. In connection with your operations there in Illinois, you suggested to Mr. Ives the forming of a little company, or syndicate for the purpose of purchasing oil and gas leases and seeing what could be done in that respect, did you not?

A. That is right. Illinois was getting to be quite an oil place, quite an oil play then.

Q. All right. And just handing you one of the many similar exhibits that we have referred to, I am handing you now Plaintiff's Exhibit Number 54, being one of the Petroleum Company, The Petroleum Investment Company Agreements. I will ask you if that was the type of agreement that you had with various people around Aledo?

A. Yes.

Q. That is your signature on that one, isn't it?

A. That is.

Q. It shows Maud Rogers apparently put in $2,500.00 on October 20, 1939?

A. Yes, but not—I mean she didn't give to me.

Q. I don't know that she delivered it to you personally but you did get the money, didn't you?

A. I wouldn't say that I got all the money.

Q. Well, that is your signature there?

A. My signature was made before she had ever signed it. I didn't give her that receipt.

Q. Now, how many people did you have associated with you in this Petroleum Investment Company?

A. I never did know, sir.

Q. Who did you leave that to?

A. Mr. Ives.

Q. You left it to Mr. Ives then to get various people to join with you and you left with Mr. Ives signed copies of this Petroleum Investment Company Agreement?

A. That is correct.

Q. You relied on Mr. Ives then as your representative to go out and see people if they wanted to join and contribute money, didn't you?

A. Yes, sir.

Q. You left it to Mr. Ives to see how much money different people wanted to contribute, didn't you?

A. Yes, sir.

Q. I will ask you if it is correct that in this written agreement with these various people you recall this statement: "Now, therefore, it is mutually agreed—" strike that. I want to go back a little further. How long were you acquainted with Dale Ives before you started this Petroleum [fol. 1223] Investment Company, syndicate, or company?

A. Just a short while.

Q. And you knew that Aledo was just a small farming community there in Illinois, didn't you?

A. I did.

Q. You did become acquainted with such people as Doctor Danford and Mr. Hall and Maud Rogers and Mr. Wadleigh and Mr. Berglund and the Constants and the Stites and others that I will not take the time to mention?

A. That is right.

Q. Those names are familiar to you?

A. Yes, sir.

Q. You knew that those people were not experienced in the oil and gas business, didn't you?

A. That is correct.

Q. You knew that in that vicinity there that oil and gas development was something new for Illinois—I withdraw that. There was no oil and gas development right around Aledo, was there?

A. Not very close.

Q. You knew that those people were chiropractors, farmers, doctors, and merchants of a small farming community?

A. Yes, sir.

Q. You knew that they were depending and trusting you to handle their funds fairly and squarely, didn't you?

A. That is right.

Q. And you accepted that trust from that group of people, right?

A. That is right.

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[fol. 1226] You never did invest any money yourself in the Petroleum Investment Company?

A. No.

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May I pause there a moment? While the agreement says that these people shall pay the money directly to you, as a matter of fact, as you have heretofore testified, it was paid to Mr. Ives?

A. Almost all of it.

Q. Almost all of it?

A. That is right.

Q. And so that was the custom of getting that money to you, was it not?

A. That is right.

Q. That is right, isn't it?

A. That is right.

Q. The people to Ives and Ives to you for the contributions, right?

A. Right.

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[fol. 1227]

. . . . . .

Now, I think you say that you don't know how many people contributed to that association?

A. I would have no way of knowing.

Q. In any event, you first had some operations in Illinois and you were not very successful or not successful at all in getting production, were you?

A. That is right.

Q. Some of those deals you had farm-outs and assistance and contributions from other people on, didn't you?

A. All kinds of assistance.

Q. All kinds of deals?

A. That is right.

Q. So the money that might have been spent on those dry holes wasn't all the Petroleum Investment Company's money?

A. That is right.

Q. That is correct, isn't it?

A. Yes.

Q. Now, you started this Petroleum Investment Company along in the fall of 1938, did you not?

A. I believe that is correct.

Q. And within about six months you were getting ready to go to Kansas. That would be in the spring of 1939, now or early summer?

A. I was going to California.

Q. You were going to California?

A. That is right.

Q. Well, you had met Deering Marshall, however, in Illinois, hadn't you?

A. That is correct.

Q. Had you know Deering Marshall before you met him there in Illinois?

A. I had not.

Q. You soon learned that he was an experienced oil man?

A. Yes, sir.

Q. He told you, I believe you say, of what he thought were opportunities in Kansas?

A. That is right.

Q. And when you left Illinois you intended to see Deering Marshall here in Kansas, didn't you?

A. No, no, that is not correct.

Q. You didn't?

A. No.

Q. Well, didn't I understand that you were on your way to California, had an automobile wreck, and that Mr. Marshall was at your bedside when you came to?

A. That is right, in Tulsa. I wasn't coming through Kansas.

Q. If you didn't have an appointment with Mr. Marshall——

A. I had an appointment with Mr. Marshall in Tulsa.

[fol. 1228] Q. That is what I am getting at. When you left Illinois you did expect to meet Mr. Marshall before you got to California?

A. That is correct.

Q. That is correct, isn't it?

A. That is correct.

Q. Now, what was the date of your automobile accident?

A. I am not sure. It was in the spring.

Q. The spring of 1939?

A. I believe it was in May.

Q. And——

A. April or May.

Q. April or May?

A. Yes.

Q. And at that time you had this automobile accident you were first laid up for awhile in the hospital and then you went out to the home of Mr. Ranney to recuperate a little while, didn't you?

A. That is correct.

Q. During that period did you see Deering Marshall again?

A. I believe I did but I am not sure.

Q. And was that the time that you discussed with Mr. Marshall about trying to acquire some leases in Kansas?

A. Yes, I discussed with Mr. Marshall and also Mr. Riley and Mr. Ranney also.

Q. Well, in substance, you set forth in your Interrogatories that I believe you are familiar with by now, that

you and Marshall formed a partnership and you were to furnish the money and Mr. Marshall was to try and get some leases?

A. That is right.

Q. I think your statement is in the answer to Interrogatory Number 8, where you say:

"An oral partnership agreement was entered into between W. H. Black and Deering J. Marshall some time in 1939, the exact date of which is unknown."

Now that we have been discussing it, it was in the spring of 1939, wasn't it?

A. Yes.

Q. And continuing with your answer to the Interrogatory:

"Under which W. H. Black advanced money for traveling and other expenses to Deering J. Marshall who acquired oil and gas leasehold interests. In substance, the oral agreement was that the leases as acquired would be jointly owned by W. H. Black and Deering J. Marshall. The leases acquired and the amount paid therefor are as follows:"

[fol. 1229] And then you list these five Kansas leases that we are all familiar with.

Now, you say that you entered into that partnership with Deering Marshall in the spring of 1939. That is right, isn't it?

A. That is right.

Q. And then you had an automobile accident and how long were you laid up and unable to get out and do any oil or gas business yourself?

A. This partnership that you speak of was after I had had the automobile accident, sir.

Q. All right. Let's try and fix the date when you had the partnership.

A. Well, that is when I gave him the money to go buy this lease, the Esfeld lease.

Q. Which lease was that?

A. The Esfeld lease.

Q. The Esfeld?

A. Yes, sir.

Q. You gave Mr. Deering Marshall money with which to go and acquire the Esfeld lease, didn't you?

A. Well, it was to pay on the contract, it was a farm-out, there was no cash concerned.

Q. Now there is no dispute, as I understand it, but what money that you gave Deering Marshall to get the Esfeld lease had come from the Illinois group of people?

A. It had not, sir. I think $600.00 of it had. I think $600.00 of that money came from Mr. Ives or Mr. Boyd.

Q. I am not trying to misstate or mislead you.

A. I *I* think I told you that Mr. Boyd or Mr. Ives one, that I was a little short on the account of my hospital bill, and they sent me or wired me I believe $600.00.

Q. I am talking now about the cost, original cost now, of the Esfeld lease?

A. I am talking about the same thing, sir.

Q. All right. That was the first lease that was acquired in Kansas, wasn't it?

A. That is right.

Q. That lease was acquired by Deering J. Marshall, he is the man that made the contact?

A. That is right.

Q. That lease cost you—you state in your Interrogatories—$3,000.00?

A. I don't think that is right.

Q. Well, let me hand you that Interrogatory here.

A. Unless there was some traveling expense connected with it.

Q. In your Interrogatory Number 8 you list the date of acquisition and the cost of these five leases. I will leave you that for your reference. Now don't you say that that lease, [fol. 1230] the Esfeld, cost $3,000.00?

A. No, I do not. You are looking at the wrong one.

Q. I beg your pardon. It is Number (3) and says it cost $2,500.00, is that right?

A. That is what I said.

Q. I apologize. Now, who put up the $2,500.00?

A. I did.

Q. Where did you get the money?

A. I had it.

Q. Where from?

A. From Evansville, Indiana, I had some leases over there with Mr. Garland that I sold.

Q. You had some leases in Evansville, Indiana?
A. That is right.
Q. With a Mr. Garland?
A. That is right.
Q. Where were those leases?
A. I couldn't tell you today where they were.
Q. What county were they in?
A. He was in Evansville. They were in White County.
Q. What part of White County?
A. Southern part.
Q. Southern part of White County?
A. That is right.
Q. Near what town?
A. Falls City, I believe was the name of it.
Q. Which direction from Falls City?
A. Between Falls City and the river.
Q. How close to Falls City?
A. About four miles.
Q. You had obtained those leases, had you?
A. Mr. Garland had obtained them and I helped him obtain them and through the Damon Corporation.
Q. What were the names of the landowners, any of them there?
A. I couldn't tell you now, sir. We had a big block of acreage.
Q. I understand, but I am talking about where you got this twenty-five hundred now. Now, you had some leases right there between Falls City and the river?
A. That is right.
Q. And you tell us that you sold some of those and got $2,500.00?
A. I got more than that.
Q. You got more than that?
A. Yes.
Q. About when did you sell them?
A. I think it was in January, I believe.
Q. Of what year?
A. January, 1939.
Q. What did you get for them?
A. I think I got four or five dollars an acre.
[fol. 1231] Q. For how many acres?

A. I think I sold forty-five hundred acres, I believe. He and I together, we split it.

Q. All right, what did you get now?

A. I got half of it.

Q. That would have been how much?

A. I think seven or eight thousand dollars all together.

Q. Seven or eight thousand dollars in the spring of 1939?

A. I think that is right.

Q. Is that right?

A. I believe that is right.

Q. From whom now?

A. From Mr. Garland.

Q. In what form?

A. No, it wasn't from Mr. Garland. It was from some oil company that we sold them to.

Q. Well, what oil company?

A. I think the Exchange Oil Company.

Q. The Exchange Oil Company?

A. Yes, sir.

Q. Where are their headquarters?

A. In Evansville.

Q. Evanston?

A. Evansville, Indiana.

Q. They acquired these leases you and Mr. Garland owned?

A. Mr. Garland—it was the Damon Corporation.

Q. Were those leases in your name?

A. They were in the name of the Damon Company, the Damon Oil Company.

Q. In the name of the Damon Oil Company?

A. That is right.

Q. You owned a half interest in the Damon Oil Company, did you?

A. No. I owned a half interest in those leases.

Q. Do I understand you then that you are telling the Court that the Damon Oil Company sold these leases between Falls City and the river, out of which you got some seven or eight thousand dollars?

A. I don't remember the amounts but it was several thousand dollars.

Q. Where did you keep your bank account at that time?

A. Well, the first bank account that I had on this was in Mattoon or Tulsa.

Q. Where did you put that seven or eight thousand dollars you got out of that lease venture?

A. I think I put it in the Bank of Mattoon. I am quite sure I did.

Q. Bank of Mattoon——

A. Yes.

Q. At Mattoon, Illinois?

A. That is right.

Q. How soon after you got the money would you say you deposited it?

A. Well, I didn't get it all at one time. It was several sales, small sales

[fol. 1232] Q. How long was it drawn out over then?

A. I should say two or three months.

Q. But all of the money then would have been checks?

A. Deposited in the Bank of Mattoon, I am quite sure.

Q. Checks that you deposited in the Bank of Mattoon, and those checks would have come from whom?

A. From the different brokers and people that bought them from the Exchange Oil Company. I don't think they bought any of them direct.

Q. You don't think they bought any of them direct?

A. No.

Q. Very well. Now then, when you got ready to buy this Esfeld lease, did you give a check of $2,500.00 to Deering Marshall?

A. I did.

Q. Do you have that check?

A. No, I don't have it.

Q. Do you have the bank account that shows that you gave him the check?

A. I don't believe I have.

Q. What bank did you draw a check on for $2,500.00?

A. On the First National Bank of Tulsa.

Q. You drew a check on the First National Bank of Tulsa——

A. That is right.

Q. —for $2,500.00?

A. That is right.

Q. And gave it to Deering Marshall?
A. That is right.
Q. And that was to pay for what now?
A. This Esfeld.
Q. Of which you would have had a half interest?
A. That is right.
Q. And Deering Marshall had a half interest?
A. That is right.
Q. Is that right?
A. That is right.
Q. And when do you say that the Esfeld lease was acquired?
A. Well right at that time.
Q. Well, this says that the Esfeld was acquired on August 9, 1939, in your Interrogatory?
A. Well, we had a well on it in July, 1939.
Q. I was coming to that. Your Interrogatory then cannot be correct?
A. It could very easily be correct. Those farm-outs are not always delivered until you have complied with your farm-out agreement.
Q. Well now, let me see if I can refresh your recollection a little about that matter. I will ask you, while I read [fol. 1233] Defendant's Exhibit Number, or Plaintiff's Exhibit Number 57, if this will refresh your recollection. This is a letter from Dale Ives at Aledo, Illinois, to you at La Jolla, California, dated July 8, 1939.

"Dear Bill: I have not written you before, due to the fact, that I thought that I might be able to get your note collected and remit to you. But I have had Mr. Nelson in several times and he is very hard up, but has promised to pay half of this note next week, and the balance within a very short time."

Now, had Mr. Nelson given you a note?
A. I think he did. I don't remember the exact details of it.
Q. He gave you a note so that you could take it over to the bank and get some money to help with Esfeld, didn't he?
A. Well, he did not.
Q. All right. Mrs. Rogers, didn't she give you a note?

A. She owed me some money. They both owed me. The two of them together, I am sure, owed me $450.00.

Q. All right, continuing with the Dale Ives' letter:

"I have not heard anything from the Kansas well as all the news I receive regarding it is from the Gas and Oil Journal, which is late this week."

Now, what Kansas well was Dale Ives referring to here on July 8, 1939?

A. I told you that Mr. Ives sent me, I think, $600.00.

Q. For what well?

A. To go into this venture, in this Esfeld.

Q. In the Esfeld?

A. That is what I told you, sir.

Q. Well then, when he was writing you on July 8, 1939, it indicates you had acquired it long before August. That is set forth in the Interrogatories. Doesn't it so indicate?

A. It certainly does.

Q. Yes, sir.

A. But this possibly is when we got the title. You are certainly trying to confuse me, sir, and it isn't good because you know——

Q. No, I am not trying to confuse you. I am just asking you to look at your own answers, sworn to under oath, and compare them with some of these other matters.

A. This is possibly the date and I am not sure. I have no [fol. 1234] way in the world of knowing. This is the date that possibly the lease was filed in our name. Now, that, I don't know. We do drill oil wells on farm-out letters without lease assignments, as I am sure you know.

Q. Well, does this letter serve to refresh your recollection that you were dealing with these Aledo people on this Kansas well at least as early as July, 1939?

A. May I see the letter?

Q. Certainly.

A. That is from Mr. Ives, isn't it?

Q. That is right, sir.

A. Yes. The only two that I thought were interested at that time was Mr. Ives and Doctor Boyd.

Q. I am not asking you who you thought was sending money down from Aledo. I will come to that.

A. They sent me $600.00, sir. If it took everybody in Aledo to send me $600.00, they didn't put much in, they didn't put in very much.

Q. We will come to that in a moment. You miss my point. I am asking you if you weren't discussing with these Aledo people as early as July the 8th, that they had an interest in this Kansas well of some kind?

A. Yes, sir.

Q. Very well. When did you say you quit the drilling operations in Illinois and came to Kansas?

A. When di I I say we quit it?

Q. Yes.

A. In the spring of that same year.

Q. Spring of 1939?

A. I think we just completed our last dry hole a week or so before I left Mattoon.

Q. What would be the approximate date that you say that you gave up the Illinois operations?

A. I would say it was in April or May.

Q. Of 1939?

A. I think so.

Q. Now, let's go a little further. After Mr. Ives wrote you about this Kansas well, I will ask you if you didn't write to him from La Jolla, California, on July 17, 1939, as follows:

"Dear Dale: This will acknowledge receipt of your letter of July 12th, acknowledging my telegram. Also enclosing the check for which I thank you very much."

Now, what check did Mr. Ives send you?

A. That is the $450.00 that these people owed me.

[fol. 1235] Q. That was the $450.00?

A. Yes, sir.

Q. Now, this is your letter—I will skip a little bit and come to the pertinent part.

"You will have to hold your seat for the following information: I just had a wire advising that the official test on the Kansas well yesterday and test shows our well for 5,189 barrels. This, of course, is even better than we expected. That, my friend, is a real oil well and an oil property that even the biggest operators would be envious of. We have not as yet been able to get the well started in

Rice County due to various delays which are to be expected in getting together a deal of that kind. It will all work out in the long run but there is always some unforeseen obstacles showing that may cause extra work and delay."

Then you discuss about how you are feeling and then you say:

"I wrote you a letter July 13th and after posting my letter to you I received your letter of the 12th which is very good service. I again wish to assure you that it is my earnest desire to come East just as quickly as the doctors will permit me to do so and get back on the job as we now have something to go after.

"There are many different angles that I want to discuss with you when I see you and it would be impossible to approach them by letter. However, we will just let them ride until I am with you in Aledo or have you join me in Kansas."

Now do you want to tell the Court here that in a letter of that kind that you are informing Mr. Ives that this Kansas well has come in for 5,189 barrels, that it is a better well than you expected, that you are going to hurry back to Aledo now to see Mr. Ives, that there are many angles to go over, that these people didn't have an interest in the Esfeld well?

A. I certainly will, surely. I told you I didn't know they had an interest in it.

Q. I beg your pardon?

A. I will tell you that I certainly didn't know they had an interest in it.

Q. May I inquire then why you were writing Mr. Ives about "our well and our interest"?

[fol. 1236] A. Because Doctor Boyd and Mr. Ives together were the people that I was dealing with and I thought definitely that he told me that the $600.00 came from them.

The Court: What is that, I didn't hear that.

A. That the $600.00 that he sent me came from Doctor Boyd and himself.

Q. Well then, what were the angles that you wanted to go over?

A. Sir, you wouldn't believe it, but I was quite anxious to see if we got some oil that the people who had lost their money in the Illinois venture could participate in it on some basis. I didn't know——

Q. And so one of the angles was to see that these Aledo people in the Petroleum Investment Company would be protected in this Esfeld, is that right?

A. I would say that I would like to see them protected. I always felt that that was a very honorable thing to do, yes.

Q. And an equitable thing to do?

A. Yes, I would say that.

Q. Yes, sir. Now did you send a wire to Mr. Dale Ives on October 31, 1939, in which you said the well in the Northwest of the Southwest, 33, also well in the Southeast of the Southeast 33, 16-11, both in today for good wells. Day well about ten feet off pay. Lots of excitement here. Looks like all of our Barton County acreage in the money. Regard W. H. Black.

Do you remember sending that telegram in October to Mr. Ives?

A. I presume I did.

Q. You say here that there was lots of excitement and it looks like all of our Barton County acreage is in the money?

A. That could be one lease or a dozen, sure.

Q. What Barton County acreage did Mr. Ives or the people who were supplying the money to Ives, that you didn't know about, have an interest in this Barton County when you sent that wire?

A. What acreage, what leases?

Q. Yes, sir.

A. I can't tell you right now, sir. I would have to look at the records.

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[fol. 1237]

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Q. The Esfeld, Dolechek and Weber would be the Barton County acreage that you said looks good?

A. Yes.

Q. Thank you. Now, sir, you state further in your Interrogatories there that you admit receiving at least $30,-

000.00 from the Illinois people that you thought was coming from Ives and Boyd from the middle of 1939 until you were incorporated in the spring of 1940, don't you?

A. I don't say that I thought it was all coming from Boyd by the time we were incorporated, sir.

[fol. 1238] Q. You knew Ives was sending the bulk of that money to you, didn't you?

A. Yes.

Q. And you did get $30,000.00 from the summer of 1939 until January 2nd, when you incorporated, you admit that in one of your Interrogatories?

A. Well, I would have to see the receipts.

Q. Very well. I will find them for you.

Mr. Siefkin: Number 9.

Q. Number 9. It is on page 5, near the center of your answer.

"During the last half of 1939 and early 1940, (prior to the incorporation of the company) I received from or through either Doctor Boyd or Dale Ives sums totaling approximately $30,000.00 which was used in the Kansas operations. I had no knowledge as to the source of these funds other than that they came through either Doctor Boyd or Dale Ives."

I have read that portion of your answer correct, haven't I?

A. That is correct.

Q. And that is the truth, isn't it?

A. I am not sure about the amounts but it is approximately $30,000.00. I couldn't tell you.

Q. Well, your attorneys didn't admit getting more money than you actually received, did they, Mr. Black?

A. I wouldn't know, sir.

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[fol. 1241]

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Q. Let me ask you, Mr. Black: You repeatedly were drawing drafts on Mr. Ives while you were in Kansas in these early operations, weren't you?

A. As fast as I could, sir.

Q. Just as fast as you could?

A. Yes, sir.

Q. You wanted all the money you could get, didn't you?

A. Yes, sir.

Q. You telephoned him to get money from people, didn't you?

A. No.

[fol. 1242] Q. You did not?

A. I telephoned him for money. I didn't tell him to get it from people.

Q. You telephoned him for money, didn't you?

A. That is right.

Q. Well, now, when you got that check from Mr. Berglund, you knew that some of the Petroleum Investment Company people thought they were in on that Kansas operation, didn't you?

A. Yes, sir.

Q. Did you ever tell Mr. Berglund that he was not in on it?

A. I never did. They were in on it and that is how they got their stock.

[fol. 1243]

Q. Now this money that Mr. Ives was sending you that these Petroleum Company people were giving to him, you got that in the form of checks and also you drew drafts on Mr. Ives, didn't you?

A. Yes, sir.

Q. And what bank account did you put that in?

A. The Fourth National Bank, Wichita.

Q. Here in Wichita, Kansas?

A. Yes, sir.

Q. And you put that right in with your other personal funds, didn't you?

A. That is right.

Q. You just mixed and commingled this money from the Aledo people of the Petroleum Investment Company with your own funds and used it?

A. Yes, the company had no bank account.

Q. All right. Now, I want to ask you if it wasn't a fact you had no other Illinois acreage in White County except that which laid there between Norris City and the town of Herald, did you?

A. No.

Q. That is all that you had there in White County?

A. I can't exactly describe it because it was a big block of acreage.

Q. I understand, but that was all of the White County acreage you had, was right in that tract, wasn't it?

A. That is right.

[fol. 1244] Q. Now, I want to ask you if it isn't a fact that that particular acreage you had purchased with funds put up by and large by Aledo people?

A. No, sir.

Q. In what was known as the Arab Petroleum Corporation?

A. No, sir.

Q. I am handing you what has been marked by the Clerk as Plaintiff's Exhibit Number 352 and I will ask you if that is your signature on the Arab Petroleum Agreement?

A. Yes, it is.

Q. And you were taking money from the Aledo people and buying acreage there in White County, weren't you?

A. No such a thing.

Q. No such a thing?

A. No, sir.

Q. Let's see what that says. Doesn't that say: This agreement, made and entered into this—whatever the date is—1938, by and between the Arab Petroleum Corporation, party of the first part, and that particular one was from Mrs. Maud Rogers, wasn't it?

A. That is right.

Q. And that is the Doctor Maud Rogers that was in the Petroleum Investment Company?

A. That is right.

Q. And that is the Doctor Rogers that was in the Black-Marshall Company?

A. That is right.

Q. All right.

"Witnesseth: Whereas, the party of the first part is the owner of more than an undivided $1,000.00 interest in and to good and valid subsisting oil and gas leases consisting of approximately 2,850 acres," and then it goes ahead and describes it there—" * * * located in White and Gallatin Counties, Illinois."

A. That is right.

Q. Then you were taking the money from some of these Aledo people and putting into what you called the Arab Petroleum Company and buying leases in White County?

A. We were not doing that, sir. We put this money into drilling a well after we had the leases on a block of 2,850 acres in White County.

Q. All right. Now, let's see a little further about that White County acreage. You say that you sold that in the spring of 1939 and used some of the money in this Esfeld lease. That is correct, isn't it?

A. That is correct.

Q. As a matter of fact, in the fall of 1939, you wrote a letter to Mr. Clark Ranney, which has been introduced in [fol. 1245] evidence here as Plaintiff's Exhibit Number 58, in which you said that you proposed to transfer into a new corporation to be formed certain leases providing the Landowners Oil Association would put in certain leases. Do you remember that letter you wrote Mr. Ranney?

A. I think I do. I would like to see it, sir.

Q. And in that letter to Mr. Ranney in October of 1939, I will ask you if you didn't say in that letter that you were putting in a thousand acres of leases in White County, Illinois?

A. I would like to see the letter.

Q. I am asking you.

A. I don't know until I see the letter, sir.

Q. All right. I wish you would look at that letter and explain how, if you sold that White County acreage in the spring of 1939, you still had it in the fall of 1939 to put into this new corporation?

A. That is very unreasonable, sir. I told you we had eleven or twelve thousand acres in White County and it was owned by Mr. Garland of the Damon Company and my-

self, equally, and we later divided it up; had nothing to do with this acreage whatsoever, sir.

Q. You told the Court not five minutes ago that all the leases you had in White County was there between Norris and——

A. That is right, I still tell you that.

Q. Didn't you say you disposed of those in the spring of 1939 to get money to go down to Tulsa?

A. I didn't say I disposed of it by any means, sir.

Q. You didn't?

A. No, sir.

Q. How much of it did you dispose of in the spring of 1939?

A. I think we got $4.00 an acre for it and I think we sold about twenty-two hundred or twenty-four hundred acres, I believe.

Q. All right, let's say that there was twenty-four hundred acres at $4.00 an acre. That would be less than ten thousand dollars, wouldn't it?

A. That is right.

Q. And you weren't entitled to more than half of that, were you?

A. No, but I am not sure how many acres. But my part of the——

Q. Let's stay with the figures a moment. You wouldn't have gotten more than $5,000.00 of it then, would you?

A. If that is the number of acres but I can't remember.

Q. And you told the Court you didn't get that in one lump sum, didn't you; that it came to you in payments over [fol. 1246] a period of time; isn't that right?

A. Yes, I didn't sell it all in one block.

Q. Now, let's go to another thing. You gave an accounting to this Petroleum Investment Company of how you had spent the money there in Kansas to acquire these five leases, didn't you?

A. I think so.

Q. You wrote a letter to Dale Ives on December 7th, 1939, itemizing how you had spent the money, didn't you?

A. I don't know.

Q. You mean to say you did not?

A. I don't say I did not. I can't remember every letter that I wrote.

Q. Let's see if we can refresh your recollection on that, sir. I hand you, Mr. Black, what has been marked and introduced in evidence as Plaintiff's Exhibit 10, and ask you to state if that isn't a photostatic copy of a letter which you sent to Dale Ives on or about December 7, 1939, giving an accounting of the money of the Petroleum Investment Company that you had spent in Kansas?

A. Yes.

Q. Now, point out in there, if you will, where you show that you had spent any money from your Illinois sale of leases that you claim in acquiring the Esfeld, the Dolechek, the Krier, the Weber or the Hoffman leases?

A. Well, it says money spent to date, $28,415.00.

Q. Let's take up this letter and read it?

A. All right.

Q. It is dated December the 7th, 1939?

A. Right.

Q. Addressed to Mr. Dale Ives, Aledo, Illinois.

"My dear Dale: I am enclosing herewith copies of our accounts as of this date. I believe that you will find them all in order; if not, and I have overlooked some of the items, I wish you would please advise me. This record, of course, is for your personal use.

"I am also enclosing a copy of our drilling agreement with Armer and Armer, also a copy of the contract purchase of the Feltes lease. The contractor expects to spud our well in today. When we left there last night the rigging up was practically completed.

"There is still no definite indication as to the size of the Day well as it is still uncompleted insofar as the well being equipped. There is no question but what he has a very fine well, and we are perfectly safe in going ahead with our off-[fol. 1247] set. Unless he does better the next few weeks than he has the past month, we will have our well completed and in the tanks before he does.

"I am attaching a little plat on the Krier lease, which shows it as an off-set to the Vernon well and three locations from production on the east. I don't see how we could miss production on this lease.

"I trust that the enclosed information will be useful to you. Thanking you for your splendid cooperation and with kindest personal regards, I am,

"Very truly yours,

"W. H. Black."

That is the letter you sent to Mr. Ives, on December 7, 1939?

A. That is the letter.

Q. Now let's look at that letter a moment. In the second paragraph you say: "I am also enclosing a copy of our drilling agreement with Armer and Armer."

A. That is right.

Q. Did you attach a copy of the drilling agreement?

A. Yes.

Q. And that was for the drilling of a well on the Weber lease?

A. That is correct.

Q. Now for the information of the Court, on December 7, 1939, you just had one producing well. That was the Esfeld, wasn't it?

A. I think that is right.

Q. And so then your next well was the drilling on the Weber lease?

A. Yes.

Q. And on December 7th, 1939, you owned the Weber lease and you sent a copy of the contract to drill a well on it back to Aledo, didn't you?

A. Yes.

Q. Now, in the third paragraph of your letter you say that you think that the Day well is going to be a very fine well?

A. That is correct.

Q. And that you were perfectly safe in going ahead with an off-set. Now this Weber well was the off-set to the Day well you mentioned, wasn't it?

A. That is right.

Q. In other words, what you were telling the people back in Aledo was that the Day well looked like a good well, therefore, you thought it was wise to drill on the Weber

[fol. 1248] lease and you had entered into a contract with Mr. Armer to drill the well?

A. That is right.

Q. That is right, isn't it?

A. That is right.

Q. Then in the next paragraph:

"I am attaching a little plat on the Krier lease, which shows it as an off-set to the Vernon well and three locations from production on the east."

Then you say later:

"I don't see how we could miss production on this lease."

So you did own the Krier lease at that time, didn't you?

A. That is right.

Q. And, as a matter of fact, turning over several pages, under "Monies spent to date:" You mention the Esfeld Number 1 that you had spent $5,000.00 to date on it, is that correct?

A. That is right.

Q. You mentioned the Dolechek lease, that you spent $2,500.00 to date on that one?

A. That is right.

Q. You mentioned the Hoffman lease, that you spent $5,000.00 on to date?

A. That is right.

Q. You mentioned this Armer drilling deal and that was on the Weber lease?

A. That is right.

Q. So you owned the Weber. And, let's see, we have got the Esfeld now, and the Dolechek and you mentioned the Hoffman, and you mentioned the Weber and you sent a plat of the Krier lease. That is right, isn't it?

A. That is right.

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[fol. 1250]

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Q. But you did sign a binding written contract?

A. I did.

Q. For the Krier lease as early as the 29th of November, 1939, didn't you?

A. That is correct, sir.

Q. And it was a binding obligation?

A. On myself, that is right.

Q. Now let's see whether it was on yourself. You sometimes referred to yourself as the Black Oil Company, didn't you?

A. That is right.

Q. You sometimes referred to yourself as W. H. Black, Incorporated?

A. I never did. That was put on there—I don't know why—that was a mistake. I never had any W. H. Black, Incorporated.

[fol. 1251] Q. Whenever W. H. Black, Incorporated, or Black Oil Company appear, wherever they appear, that was just another name for the Petroleum Investment Company, is that correct?

A. I wouldn't say so.

Q. Didn't you tell the Court that the Black Oil Company never operated?

A. It never had an account, it never issued stock. There was never a meeting or anything else that I ever knew of in the Black Oil Company, sir.

Q. Isn't this the fact: That the Petroleum Investment Company at your suggestion was thinking about incorporating?

A. That is correct.

Q. That is right, isn't it?

A. Mr. Ives and Mr. Boyd and ourselves were going to incorporate and did incorporate the Black Oil Company.

Q. But the Black Oil Company never had any assets except what the Petroleum Investment Company had, did it?

A. Well, they never had any assets.

Q. All right. And how come that you had this signed W. H. Black, Incorporated?

A. I don't know, sir, why that "Inc." is on there. Mr. Coe Russell prepared that and I assure you I don't know. It doesn't mean a thing.

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[fol. 1259]

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Q. All right. So up to December 6th, 1939, on these five Kansas leases you itemized and reported that you had spent $28,415.00?

A. That is right.

Q. That is right, isn't it?

A. That is correct.

Q. Now as a matter of fact, on the Dolechek lease you made an error there, either unintentionally or was padding the account. I am not trying to argue that matter but you reported to these people that you paid $2,500.00 for the Dolechek back to Aledo there in 1939. Your Interrogatories now say that you only paid $1,800.00 for it. Should that actually be eighteen hundred or twenty-five hundred?

A. I really don't know, sir.

Q. Very well.

A. I wouldn't say.

Q. Now, going back to the overall figure. You reported that you had spent $28,415.00?

A. That is right.

Q. You swear under oath in your Interrogatories you had received $30,000.00 or better in that same period of time from Aledo.

Mr. Siefkin: Just a moment. I object to that as not a correct statement of the Interrogatories.

A. Here is my letter which says——

Q. Let me look at the Interrogatories. I may not have understood them.

Mr. Siefkin: The Interrogatories were as of the date of the incorporation, Mr. Walker.

Q. All right. During the last half of 1939 and early 1940, but prior to the incorporation of the company?

[fol. 1260] Mr. Siefkin: That is right.

Colonel Walker: "I received from Ives or Boyd sums totaling approximately $30,000.00."

Q. What I am getting at, you did receive from the Aledo people from the summer of 1939 until, we will say the date of incorporation, which I think was January 2nd, or January 3rd, 1940, approximately $30,000.00, didn't you?

A. Not that much, no. I received that much before we had a bank account for the Black-Marshall Oil Company.

Q. And when you incorporated Black-Marshall you turned over these five Kansas leases, didn't you?

A. Yes, I think so.

Q. And you turned them over with an indebtedness which Black-Marshall assumed of, roughly, $9,000.00, didn't you?

A. On the equipment, some amount on the equipment of the Esfeld, I am not sure how much it was.

Q. Well, wasn't that amount approximately $9,000.00?

A. It could be.

Q. Mr. Black, I will go on to another matter for a moment or so while other Counsel help me find the record, but if it be true that you had received some $30,000.00 and up, that is the $30,000.00 up to January 2nd, 1940, and that you had only spent up to December 6th, $28,000.00, and you turned these leases over to Black-Marshall with an indebtedness of approximately $9,000.00, you had not spent as much as you received from the Aledo people, had you?

A. That is not right.

Q. All right. Now, I notice in connection with the money that you had spent you charged the Petroleum Investment Company people with your personal expense of $1,800.00, didn't you?

A. Yes, sir.

Q. You charged them up with miscellaneous expense of $1,050.00, didn't you?

A. Yes, sir.

. . . . . .

[fol. 1261]

. . . . . .

Q. Calling your attention to this figure of indebtedness at the time you turned these leases over to Black-Marshall, and I am referring now to Defendant's Exhibit Z, being an audit report of July 31, 1942, of the Black-Marshall Oil Company, and I ask you if it doesn't recite in there that at the time this company was formed the Dolechek, the Esfeld, the Hoffman, Krier and the Weber leases, were turned over to the corporation and the corporation assumed a liability of $8,827.93; is that the amount of the indebtedness that is shown that Black-Marshall assumed?

A. I can't read it that far.

Q. I am sorry.

A. Yes, I think that is right.

Q. All right. I just wanted to fix the figure.

. . . . . .

[fol. 1277]

Q. Now I want to drop back to the Petroleum Investment Company people a moment. I will ask you if it isn't a fact that you received from Mr. Dale Ives Plaintiffs' Exhibit Number 56 along in June, June 8, 1939, where he was enclosing a map of "Our acreage in Barton County, Kansas", sending it to you?

A. Rice and Barton County.

Q. That is right, and in that letter of June 9th, didn't he say that everything is quiet around here now but we hope by the first of the month we will know what some of our properties will do?

A. That is right.

[fol. 1278] Q. You were expecting some word about that Esfeld along in June or July then, weren't you?

A. Yes, and also some operations we had in Illinois and Indiana.

Q. All right. Now, I think these letters are in evidence which you wrote to Mr. Dale Ives, one on October 16, 1939, and one on November 12, 1939, and before I finish I will give you the Exhibit Numbers. Let me ask you this: If, on October 16, 1939, if it isn't a fact that you wrote to Mr. Dale Ives—and this would be Exhibit Number 11, Plaintiff's Exhibit Number 11—and state to Mr. Ives as follows:

"Dear Dale: I received your letter this morning and I am going to try to be in Illinois in about a week."

Now, do you recall whether or not after the Esfeld came in you were out in LaJolla at that time recuperating from an automobile wreck when the Esfeld came in?

A. That is right.

Q. We know that the Esfeld came in in July of 1939, don't we?

A. That is correct.

Q. Then you came back from LaJolla to Wichita here, didn't you?

A. Yes, sir.

Q. And you wrote Mr. Ives, apparently, October 16, 1939, that you are going to try to be in Illinois in about a week. Do you know whether you went up there or not?

A. I am not sure.

Q. All right. Let me ask you about some other things in this letter. "I have a production deal in my possession that I have been working on since the day I arrived, but could not see a chance of working it out until today. I now have the owners convinced that they would be better off with us than they would operating the properties themselves, and we are just on the verge of coming to an agreement that would give us 7,000 or 8,000 barrels a month settled production and with a better allowable which is sure to come, this can be doubled."

And then I am skipping some that is not material, but you say: "If I told you the kind of deal I am endeavoring to make with the owners, it would frighten you; therefore, I am not going to mention the terms until I have arrived at [fol. 1279] a definite agreement with them which I hope to have by the end of this week." That deal that you were discussing with Dale, didn't materialize, did it?

A. No, sir.

Q. Now, during this period of——

A. May I tell you: We operated those properties for a while and it wasn't satisfactory.

Q. I understand, yes, sir. During this time that you were in Kansas these Aledo people were giving this money to Dale and you were drawing drafts on Dale, all of your communications back and forth were with Dale Ives, weren't they?

A. Yes.

Q. You weren't writing letters to Doctor Danford or any of these other people?

A. I didn't even know they were in there. He doesn't refer to them in any of his correspendence.

Q. You just called them your associates?

A. I called Doctor Boyd and Mr. Ives my associates.

Q. Well, you called them in your letters here your associates?

A. Yes.

Q. You didn't know how many you had. Now then, in this letter don't you say this:

"I will possibly have to go to Chicago this weekend or the first of next week to close the Landowners' deal, and

will either see you on the way up there or have you meet me in Chicago, or else I will see you on my return from Chicago. I will keep you advised of my plans.

"With kindest personal regards, I am

"Yours very truly,

"W. H. B."

You did send that letter marked Plaintiff's Exhibit Number 11, did you not, to Mr. Ives?

A. I imagine I did. I can't remember the letter, sir. If it is in evidence I would say yes.

. . . . . .

[fol. 1280]

. . . . . .

Q. Now I want to call your attention to another matter. You had been discussing with the Landowners about forming a corporation and they turn in their stock and get the 20,000 of common and you would turn in the leases and get the 40,000 common and 4,000 preferred we mentioned. Do you remember that in November, 1939, you wrote Plaintiff's Exhibit 8 to Mr. Dale Ives, in which, among other things, you said this:

"I am very anxious to get away from here, and join you in Illinois so that we can complete our organization, and operate as a company, instead of as an individual. However, it might be advisable to get everything ready and still not make the transfers into the company until after the 1st of January to save a lot of red tape and corporate expense for this year's operation, but you will be more familiar with that phase than I, and I will be glad to be governed by your opinion in this matter.

"I hope to sell the royalty tomorrow, and as above stated, make a satisfactory drilling contract, and I will advise you of our success just as quickly as possible.

"With kindest personal regards, I am,

"Yours very truly."

Do you recall writing to Mr. Ives that you wanted to get this corporation set up and start off——

A. What is the date of that letter?

Q. November 12, 1939?

A. Yes.

Q. And you had in mind that Mr. Ives would get the corporation ready to start out the first of 1940?

A. Yes.

Q. And, as a matter, of fact, you and Mr. Ives did get [fol. 1281] the Black-Marshall Company incorporated along about the 2nd or 3rd of the month, 1940, didn't you?

A. In early January, yes.

Q. And did you turn over to the Black-Marshall Corporation the Krier, the Weber, the Hoffman, the Dolechek and the Esfeld leases, didn't you?

A. Yes.

Q. And Black-Marshall assumed the liabilities against those leases and took all of the assets, didn't they?

A. That is right.

Q. Now at this incorporation meeting I think many of the witnesses have placed it at January 10th. You didn't have any stock books printed at that time and don't you recall it wasn't until about the 20th of January, 1940, that out here at Wichita Mr. Ives had a sample certificate?

A. That could be true.

Q. So that at your first meeting there wasn't any stock actually written out and issued? You remember that, don't you?

A. No, I don't remember that. You could be right.

Q. Well, I think I can find the letter on that. Now before leaving the Petroleum Investment matter and starting in with the corporate matter, whatever assets the Petroleum Investment Company had went into Black-Marshall?

A. What assets?

Q. Whatever assets they had that was in the Petroleum Investment?

A. Yes.

Q. And that was the dissolution and termination of the Petroleum Investment Company when you organized Black-Marshall and started out as a corporation. That is right, isn't it?

A. Could be, I am not sure that I follow you on that.

Q. What I am getting at, you never had any more Petro-

leum Investment Company after you started Black-Marshall; you never had any more Black Oil Company, did you?

A. No.

Q. Now then, you know, do you not, that there was both common and preferred shares of stock in this Black-Marshall Company. There is no dispute about that, is there?

A. No.

Q. Mr. Black, calling your attention to Certificate Number 8, on the stub here it says Certificate Number 8, 10,000 shares, W. H. Black, et al. That is your handwriting, isn't it?

A. No, sir.

[fol. 1282] Q. Whose handwriting is that?

A. I don't know, sir.

Q. It is not Dale Ives' is it?

A. It is not mine.

Q. Well, look over here on Certificate Number 1 and, referring now to the stub——

A. Yes.

Q. That is Dale Ives' writing, isn't it?

A. That is it, I believe.

Q. Certificate Number 2 on the stub is Dale Ives' writing, isn't it?

A. That is right.

Q. Certificate Number 3 on the stub, that is Dale Ives' writing?

A. That is right.

Q. Certificate Number 4 on the stub, is Dale Ives' writing?

A. That is right.

Q. Then we come to Certificate Number 5, being the first shares to Black, et al, and you say you don't know whose writing that is on the stub?

A. I don't know. It is not mine.

Q. And it is not Dale Ives'?

A. We might turn some more and might be able to recognize it.

Q. All right, let's just do that. Certificate Number 5 is for 10,000 shares of Black-Marshall common stock issued to W. H. Black, et al, on the 23rd of January, 1940, signed W. H. Black, President, but not signed by any secretary, was it?

A. That is right.

Q. On the stub it has the notation "Certificate Number 5 for 10,000 shares issued to W. H. Black, et al."

A. That is right.

Q. But you don't know whose writing that is?

A. No, I don't. It is not mine. This is my writing right here.

Q. And we agree it is not Mr. Ives' writing on the stub?

A. No, it is not Mr. Ives.

Q. And none of Mr. Ives' writing is on the certificate itself, is it?

A. No.

Q. That is not his? All right. Let's turn to Certificate Number 6.

A. The same as that.

Q. Certificate Number 6 is for 10,000 shares to W. H. Black, et al, of the common stock of Black-Marshall Oil Company, 23rd of January, 1940, signed by you as President, isn't it?

A. Yes.

Q. But not signed by the secretary?

A. That is right.

Q. The stub there recites 10,000 shares to W. H. Black, et al, and that is not the secretary's writing, is it?

A. No.

[fol. 1283] Q. And you don't know who wrote the stub or filled out the certificate, do you?

A. I do not.

Q. Let's go to Certificate Number 7. It is for 10,000 shares, W. H. Black, et al, January 23, 1940, signed by you as President, isn't it?

A. Yes.

Q. Do you know who filled in the writing on the certificate?

A. I do not.

Q. Do you know who filled in the writing on the stub?

A. I do not.

Q. All right, let's go to Certificate Number 8. It is to W. H. Black, et al, 10,000 shares, common stock, dated January 23, 1940, and you signed it as President, didn't you?

A. Yes, I signed them all.
Q. The secretary didn't sign it, did he?
A. No.
Q. Do you know who filled out the certificate?
A. I do not.
Q. Do you know whose handwriting that is?
A. No.
Q. You do not know whose handwriting it is on the stub?
A. I have no idea.
Q. Let's go to Certificate Number 9, 5,000 shares of common stock, W. H. Black, et al, 23rd of January, 1940. That is your signature at the bottom as President, isn't it?
A. It is.
Q. Whose handwriting is it on the certificate proper?
A. I don't know.
Q. Whose handwriting is it on the Certificate Number 9 stub?
A. Same answer.
Q. Let's go to Certificate Number 10. It, likewise, is for 5,000 shares to W. H. Black, et al, January 23, 1940. That is your signature as President, isn't it?
A. Yes, sir.
Q. No signature as secretary on that certificate, is there?
A. No, sir.
Q. Whose handwriting is on that certificate?
A. I still don't know.
Q. Whose handwriting on the stub?
A. Same answer.
Q. Let's go to Certificate Number 11. W. H. Black, et al, 5,000 shares, common stock, Black-Marshall Oil Company, 23rd of January, 1940. Is that your signature as President?
A. Yes, sir.
Q. Is there any signature there as secretary?
A. No, sir.
[fol. 1284] Q. Do you know whose handwriting there is on that certificate?
A. I do not.
Q. Do you know whose handwriting is on the stub?
A. No, sir.
Q. Let's go to Certificate Number 12. That is for 5,000 shares common stock, Black-Marshall Oil Company, W. H.

Black, et al, 23rd of January, 1940. Is that your signature as President?

A. Yes, sir.

Q. No one signed as secretary, did they?

A. No, sir.

Q. Do you know whose handwriting it is that filled out that certificate?

A. I do not.

Q. Do you know whose handwriting filled out the stub?

A. I do not.

Q. Let's go to Number 13. Certificate Number 13 is W. H. Black, et al, for 2,500 shares of common stock, dated 23rd of January, 1940. Is that your signature as President?

A. Yes, sir.

Q. No signature at all as secretary, is there?

A. No, sir.

Q. Do you know whose handwriting filled out that certificate?

A. I do not.

Q. Do you know whose handwriting is on the stub?

A. No, sir.

Q. Let's go to Certificate Number 14, W. H. Black, et al, 2,370 shares of common stock, dated the 23rd of January, 1940. Is that your signature as President?

A. Yes, sir.

Q. Any signature as secretary on that certificate?

A. No, sir.

Q. Do you know whose handwriting is on that certificate?

A. I do not.

Q. Or the handwriting on the stub?

A. No, sir.

Q. Well now, let's go on now to Certificate Number 15, following that.

A. All right.

Q. Certificate Number 15 was signed by you as President and Mr. Dale Ives as Secretary, wasn't it?

A. That is right.

Q. And that is Mr. Dale Ives' handwriting on the stub of Number 15, isn't it?

A. That is right.

Q. Let's go on to Number 16—pardon me—and for identification, Certificate Number 15 was to Fred Elving for [fol. 1285] 440 shares. Now, let's look at Certificate Number 16. Before that, I will go back once more to Certificate Number 15, and call attention to the date. It was issued on the 30th day of January, 1940?

A. Right.

Q. That is right, isn't it, Mr. Black?

A. That is right.

Q. That would be just a week after this big block of Black, et al stock?

A. That is right.

Q. Now, we discussed Certificate Number 15 and we will now go to Certificate Number 16. That certificate is to Donald C. Clark for 75 shares and it shows the signature of yourself as President and Dale Ives as Secretary, doesn't it?

A. Yes, sir, it is marked cancelled for some reason, I don't know what.

Q. Yes, but I mean originally both you and Mr. Ives signed it?

A. Yes, I signed the whole book and left it with Mr. Ives, the whole book.

Q. And the stub was filled out by Mr. Ives?

A. That is right.

Q. And Certificate Number 17 was signed by Ives on the certificate and Ives' handwriting on the stub?

A. Yes, sir.

Q. Now, without going clear through the book, I want to drop back to the first shares and come up to Black, et al. Starting in with Certificate Number 1, that was Certificate Number 1 of 10,000 shares issued to W. H. Black on the 23rd day of January, 1940?

A. Yes, sir.

Q. Now that certificate you signed as President, didn't you?

A. Yes, sir.

Q. And Mr. Ives signed as Secretary?

A. Yes, sir.

Q. And Mr. Ives filled out the stub?

A. That is right.

Q. How do you explain that on the same date you got

some sixty odd thousand shares of stock that was only signed by you; Ives didn't sign the certificates, and Ives didn't fill out the stub?

A. Well, I don't think I got it. It was never delivered, he never signed it, and it was never delivered. I left the whole book signed with Mr. Ives in his office. In fact, the whole book of both certificates, preferred and common, were signed and left in his office and the stock was never issued. He evidently made some mistake in writing it out or who- [fol. 1286] ever wrote it out. It was never issued. The stock was never taken out of the book that I know of. I never saw it, I never saw those certificates, never had them in my possession.

Q. You can see they have been torn loose and re-pasted here?

A. Yes, I do.

Q. Let's look at all of them.

A. If they weren't signed they wouldn't be any good to me, would they?

Q. Let's go into that a little further.

A. All right, let's do.

Q. Now, let's take Certificate Number 5 that you say was never issued. You can see that it has been torn loose?

A. Yes.

Q. And has been repasted back, hasn't it?

A. That is right.

Q. There is attached to that Certificate Number 5, which is the W. H. Black, et al, stock for 10,000 shares——

A. Yes.

Q. There is attached to that a revenue stamp of $10.00, isn't there?

A. Yes. I didn't put it on there, sir.

Q. I know, but I am asking you if it doesn't bear a cancelled revenue stamp?

A. It does. They all seem to.

Q. Now let's look at Certificate Number 6.

A. There is no endorsement on it either, so I don't think that stock was ever issued.

Q. Certificate Number 6, likewise, shows that it has been torn loose from the stub at some stage of the proceedings, doesn't it?

A. Yes.

Q. And re-pasted back?

A. That is right.

Q. Certificate Number 6, which was for 10,000 shares to Black, et al, likewise had a federal revenue stamp cancelled, $10.00, on it?

A. That is right. May I see whose initials those are on there?

Q. Why certainly.

A. Revenue stamp was cancelled on the 6th and 3rd, 1940, looks like 6th and 3rd, 1943—I don't understand that.

Q. I don't either.

A. 6th and 3rd, 1943, the revenue stamp.

Q. That is right.

A. Well, they evidently put it on the wrong certificate, on the wrong stock.

Q. Well——

A. That is not my handwriting, sir.

[fol. 1287] Q. All right. I last asked you about Certificate Number 6 I think. It is true, is it not, that Certificate Number 7 shows that it has been torn loose from the book and then pasted back in?

A. Yes.

Q. And Certificate Number 7, likewise, shows a $10.00 revenue stamp?

A. That is right.

Q. Certificate Number 8 shows it has been torn loose from the book and then re-pasted in, doesn't it?

A. That is right.

Q. Certificate Number 8, likewise, shows a revenue stamp of $10.00?

A. That is right.

Q. Certificate Number 9 shows it was torn loose from the book and that it had a revenue stamp of $5.00?

A. That is right.

Q. Certificate Number 10 shows it was torn loose from the book and later re-pasted in it and it had a revenue stamp of $5.00, right?

A. I don't know why this—this stock was never issued, I don't know why it would be important, sir.

Q. Maybe we can make this case very short——

A. Yes.

Q. You weren't entitled to any such amount of stock as that, were you?

A. I am not saying I wasn't entitled to it. I am saying that particular stock you are talking about was never issued.

Q. And it should never have been issued, should it?

A. I assure you if it had been issued Mr. Deering Marshall would have turned in his interest into the Black-Marshall Oil Company.

Q. First of all, you say that the stock should not have been issued.

A. I didn't say it should not. I say this stock was not issued.

Q. How else can you issue stock except to fill it out and print it and put a revenue stamp on and tear it loose?

A. You have to have the signatures on it, haven't you?

Q. You signed it as President, didn't you?

A. I signed the whole book as President and left it with our attorney and the Secretary and Treasurer of the company. He was in Aledo and I was in Kansas. I left the whole book with him. You can see that they are all signed at the same time.

Q. Now let's come back here just a moment and see about this, so that the Court will know and we will all know. Do you claim that the shares of stock to Black, et al, on the [fol. 1288] 23rd day of January, 1940, were lawful shares of stock or illegal shares of stock?

Mr. Siefkin: Just a moment. I object to that as calling for a conclusion of the witness and not a statement of fact. It has already been explained.

The Court: Yes, it is calling for a conclusion.

Q. Well, there was no consideration given by you for any interest in any such shares in Black, et al, was there?

A. I don't know what you would call consideration.

Q. All right, let's see about it. You told the Landowners people that you would turn in these five leases and that you and your associates wanted 40,000 shares of common and 4,000 shares of preferred, didn't you?

A. That is right, and if you will look at the first book you will find out that is just exactly what was done.

Q. And Certificate Number 1 of the common stock was for 10,000 shares to W. H. Black, wasn't it?

A. That is right.

Q. So although you never had an accounting of the Petroleum Investment Company and you never figured up the net profits, you simply took one-fourth or twenty-five percent of the stock originally issued in Black-Marshall, didn't you?

A. I don't think so.

Q. And that was your basis for taking it, wasn't it?

A. I don't think so.

Q. Well, what basis was therefore Certificate Number 1 for 10,000 shares to W. H. Black?

A. That was our deal with the Landowners Oil Association, that we were to take 40,000 shares of common and 4,000 shares of preferred.

Q. All right. Now then, there was issued to W. H. Black 10,000 shares of common, wasn't there?

A. That is correct.

Q. And W. H. Black got 1,000 shares of preferred?

A. That is right.

Q. And you understand that no one is contesting that in this case?

A. Well then let's go on with the others then. Mr. Ives and Mr. Boyd and Mr. Marshall. That is the 40,000 shares.

Q. You understand we are not disputing that, Mr. Black?

A. I wouldn't think you would.

[fol. 1289] Q. And that amounted to one-fourth or twenty-five percent of the assets turned in by Petroleum Investment Company to Black-Marshall, didn't it?

A. I don't know what the assets were.

Q. Five leases bought with this Aledo money, you turned those in and that was the consideration for the issuance of all of this additional stock, wasn't it?

A. I can't follow you, sir.

Q. You never put any money in Black-Marshall at the beginning for stock, did you; you have testified to that, if I may prompt you?

A. I may have bought some stock, I don't know when it was.

Q. I am asking about the initial issue?

A. No, I put in property.

Q. And the only property put in was these five Kansas leases, wasn't it, outside of Landowners?

A. In the original I think that is right.

Q. That is right. So I am talking to you about this original issue, the 10,000 shares to you of common stock and the 1,000 shares of preferred stock, and there is no contest about that, but this great block of Black, et al, stock, signed by you alone, and you don't know who filled the certificates, and you don't know who filled out the stub; can you tell us how that stock came to be written up that way?

A. No, I can't.

Q. You never asked for it, did you?

A. I didn't write it.

Q. You didn't write it. You didn't want it, did you, and you don't claim today that that was validly issued, do you?

A. I say this stock isn't validly issued at all because it wasn't signed.

Q. Very well. Well, then, now let's continue a little more. You say this Black, et al, stock you had nothing to do with it being issued. That Black, et al, stock was thereafter re-issued as Certificate Number 155 to W. H. Black with a notation "Correction of name only and certificate." That is 155 for 2,300 shares, 2,370 shares. And then Certificate Number 156 to W. H. Black for 2,500 shares, just says "Correction of name only," and Certificate Number 157 for 5,000 shares, "Correction of name only," Certificate Number 158 for 5,000 shares to W. H. Black "Correction of name only", Certificate Number 159 for 5,000 shares to [fol. 1290] W. H. Black, "Correction of name only", Certificate Number 160 for 5,000 shares to W. H. Black, "Correction of name only", Certificate Number 161 for 10,000 shares, W. H. Black, "Correction of name only", Certificate Number 162, W. H. Black, "Correction of name only", Certificate Number 163, W. H. Black, 10,000 shares, "Correction of name only", Certificate Number 164 for ten or for 6,000 shares, "Correction of name only", Certificate Number 165, W. H. Black, 2,000 shares, "Correction of name only", Cer-

tificate Number 166, W. H. Black for 2,000 shares, "Correction of name only". These last shares that I have read were re-issued for this initial Black, et al, stock.

A. May I see them?

Q. Why certainly.

A. I would like to suggest that this is in Mr. Dale Ives' handwriting, both the certificates and the stubs, sir. This is not my handwriting.

Q. I won't challenge you about whether it is Mr. Ives' handwriting on the stubs.

A. And the handwriting in the original issue, both the certificate and the stub, Mr. Dale Ives' own handwriting.

Q. Now then, you are unable to explain just how that happened, aren't you, Mr. Black?

A. He had the books up there, sir. I don't know how it was handled. He was our attorney and secretary and treasurer.

Q. So whatever happened is the mistake of the Black, et al, and then these being re-issued, that was Mr. Ives' fault, wasn't it?

A. It certainly wasn't mine.

Q. Yes. Well now, then I wonder if this will help to refresh your recollection: That somebody in the Landowners Oil Association discovered that you had issued to yourself this large block of Black, et al, stock——

A. That is correct.

Q. Somebody caught that, didn't they, connected with Landowners?

A. And challenged it, yes, sir.

Q. Now it wasn't the Aledo people, was it?

A. No, I don't believe it was.

Q. But somebody in Landowners caught on to the fact that you had taken that big block of stock and forced you to meet them in Chicago to settle it, didn't they?

A. It was Mr. Allen, one of our Directors.

Q. Yes, sir, and you had to go to Chicago and settle [fol. 1291] that some way with Landowners then, didn't you?

A. No, he came here. I don't think I went to Chicago.

Q. He came here then?

A. Yes, sir, that is right.

Q. Then you knew the fat was in the fire and you knew that at the January 17, 1941, stockholders' meeting, if you showed up with all that stock it would call attention of that fact to the Aledo people, and isn't it a fact that in order to deceive the Aledo people that you showed up at the January 17th, 1941 meeting and showed on the books of this company that you only claimed to own the 11,000 shares, that is, the 10,000 common and the preferred; isn't that a fact?

A. I don't know what showed in that. I was not the attorney and I was not the secretary or treasurer, I don't know.

Q. Now, calling your attention to page 54 of the meeting of the stockholders which was held on the 17th day of January, 1941, at Aledo, Illinois, W. H. Black presided over the meeting, Dale G. Ives acted as Secretary.

"The following stockholders were present in person or by proxy and represented the number of shares of stock set opposite their names:"

Then down here, W. H. Black, and how many shares did you appear before that meeting on January 17, 1941——

A. It says 11,000.

Q. And that is all the stock that you ever claimed to own in the Black-Marshall Company at that time, wasn't it?

A. That is not right.

Q. And isn't it a fact that in order to try and deceive these Aledo people that immediately following that meeting and on the 17th day of January, 1941, you immediately went out after having been to that meeting and represented you had 11,000 shares and you wrote up and signed this certificate to yourself, Number 155, for 2,370 shares?

A. What makes you say I wrote it up?

Q. That is your signature, isn't it?

A. That is Mr. Dale Ives writing it up. That whole book was signed, as I told you, and left with Mr. Ives. Don't you think that is Mr. Ives' writing?

Q. I am asking you.

A. I am telling you it is.

Q. I am asking you, sir, if you, as President, didn't sign [fol. 1292] a certificate on the 17th day of January, 1941?

A. I did not sign it on the 17th. I signed it the year before.

Q. Very well. How do you explain that you showed up at this stockholders' meeting with 11,000 shares and on January 17, 1941, Certificate Number 155 shows you had 2,370; Certificate Number 156, 2,500 shares; Certificate Number 157, 5,000 shares; 158, 5,000 shares; 159, 5,000; 160, 5,000 shares; 161, 10,000 shares; 162, 10,000 shares; 163, 10,000 shares; 164, 6,000 shares; 165, 2,000 shares; 166, 2,000 shares, in addition to your 10,000 common and 1,000 preferred, how do you explain that happens to be dated the very same day of the stockholders' meeting if you didn't do what I have asked you?

A. I don't propose to explain because I can't explain it, sir.

Q. I think that is all on that. Now then, after you appeared at the 1941 meeting, purporting to have 11,000 shares, you heard these people testify that they saw a list there with your name of 11,000 shares. There was a list with that amount, wasn't there?

A. I never saw it. I mean I didn't see any list. It could have been there. I will not say that it wasn't but I don't remember it.

Q. Then you had the 1942 meeting away from Aledo and the 1943 Stockholders' meeting away, didn't you?

A. That is right.

Q. Then you came back to Aledo to have the 1944 meeting?

A. I think that is correct.

Q. Yes. And I think that in 1944 the War was on and there were priorities and allocations of various kinds and ceilings, and it was pretty difficult to get oil and steel and materials, was it not?

A. Yes, as I remember it was.

Q. And in the meantime, between 1939 and 1944, a period of about five years, these Aledo people hadn't received a penny as a dividend, had they?

A. They certainly had not.

Q. You had been going along about five years, had some tremendous oil wells, didn't you?

A. We had some nice oil property.

Q. Your first Esfeld well came in for 5,189 barrels?

A. Yes. They let us run 15 barrels a day at $1.15 a barrel.

Q. Oh, by the way, who got the royalty from the Esfeld [fol. 1293] well from July of 1939 until you incorporated?

A. The royalty? I have no idea who got the royalty.

Q. It couldn't have been Mr. Black, could it?

A. It couldn't have been Mr. Black.

Q. And it wasn't the Petroleum Investment Company, was it?

A. And it wasn't Mr. Black, sir.

Q. All right. Well, your second Esfeld well came in for around 16,000 barrels, didn't it?

A. I don't remember their size. Those potentials—they were big wells.

Q. They were tremendous wells?

A. They were big wells.

Q. And there was nothing unusual about a group of people that had been putting up money for some five years and knowing that you had these monstrous producing wells and wondering why they couldn't have a dividend? I mean there was nothing unusual on their part?

A. I would say there was nothing unusual about it, no, indeed.

Q. So when you went out there in 1944 to that meeting you did know that people had talked about a dividend, didn't you?

A. Yes, sir.

Q. You did know that they were expecting a dividend?

A. Yes, I heard an awful lot of talk about it.

Q. You got out there to that 1944 meeting and Mr. Ives was present, was he not?

A. Yes.

Q. You were present?

A. Yes.

Q. Mr. Blazer was present?

A. I think so.

Q. Doctor Robinson was there?

A. I don't believe he was, I am not sure.

Q. And his brother, a rather good looking, heavy-set gentleman they call Bill Robinson?

A. Yes, I remember him.

Q. You remember him?

A. Yes.

Q. And there were some thirty, forty, or fifty people there, weren't there?

A. Yes, sir.

Q. Now as I understand you, about the first thing that came up you told these people that while you realized, in substance, that they wanted dividends, that it was impractical from a tax standpoint and not good business to pay a dividend?

A. I think I have explained that before.

Q. That was the substance of that, wasn't it?

A. Yes.

[fol. 1294] Q. And when you told them there would be no dividend declared some of them looked a little downhearted, didn't they?

A. I would say, yes.

Q. And then you suggested to them that if anybody was discouraged about their stock that either you had or thought you could procure a market for their stock at $8.00 a share?

A. That is correct.

Q. Now when you made that announcement how many of those people got up and said, All right, here is my stock, Mr. Black, here is mine?

A. There were quite a number of them that signed up.

Q. There wasn't a soul that got up, was there?

A. What do you mean, "Got up"?

Q. There wasn't a soul came up and said, All right, I sure want some money, here is my stock? See that I get my $8.00?

A. I think some of them wanted to sell.

Q. Who?

A. I can't tell you.

Q. Name me a single one.

A. I can't tell you. I didn't make them sell their stock. I told them not to sell.

Q. As a matter of fact, you know that not a single person at that meeting asked you to take their stock at $8.00?

A. They even voted for me to sell it for $8.00 a share.

Q. We will come to that in a moment. But I am asking you on a sale of their stock?

A. I couldn't buy their stock.

Q. And you further explained to those people, Mr. Black, that those who elected to take $8.00 and turn in their stock would be completely and forever relinquishing their rights?

A. I expect I did, I think I did.

Q. And that would have been true, wouldn't it?

A. That would have been true.

Q. Why certainly. Then in order to make these people feel that there was some future in getting some money out of this concern, don't you remember that you told them this: That it was War Time, that derricks and steel and pipe and casing were hard to get, it was hard to get employees, there was a shortage of labor, and that as a result there was not as much drilling going on and that refineries were falling over themselves trying to find supplies of oil, that everybody wanted oil, and that you thought that perhaps the best and most practical way to get some money [fol. 1295] for these people would be to consider their producing properties, would be to consider selling their producing properties, and that would bring in some money, that you would retain the undeveloped acreage and the Landowners and then you could start a new campaign thereafter. Do you remember discussing that proposition?

A. Well, if I didn't, I should have, because those were the facts.

Q. That was a fact, wasn't it?

A. Yes.

Q. All right, the suggestion by somebody was made that you sell the entire company, whether it was a suggestion or a motion or a resolution, I don't know, and the name is immaterial, but whether it was a motion or a resolution or a suggestion, it was not the will of that stockholders' meeting to sell the entire company, was it?

A. I don't believe it was.

Q. No. And at that meeting, after getting right down to the crux of the thing, you were authorized to go out and try and sell the producing properties for an amount that would bring the stockholders at least $8.00 a share; you were to retain the undeveloped acreage and Landowners

and in the event that you was going to have to put in anything more than the producing properties, or in the event that you couldn't get $8.00 a share for the producing properties, you were to come back to those stockholders for further authority. Now, isn't that what occurred at that meeting?

A. I would say, no.

Q. What did occur then, sir?

A. I think you are correct with the exception that I was to report to the Directors and not the stockholders.

Q. I see. Well, I won't argue about that. Now, Mr. Black, this meeting in 1944 was some five years after these Doctors and Chiropractors and merchants and farmers there at Aledo had started with you in the oil business. During all of that time you had used Dale Ives as your representative to raise money from them and send to you, you had used Dale Ives as your conduit to give them information concerning this company, hadn't you?

A. Yes, he was our attorney.

Q. And he was the person that you used to keep these people informed?

A. More or less, yes.

[fol. 1296] Q. And you knew that they relied upon him for their information, didn't you?

A. Yes, of course, pretty near all the Directors were there and lots of those stockholders were down here themselves and I think pretty near every one of them has been to the properties and down at the office.

Q. And haven't your own attorneys as late as yesterday read into the record here some fifty odd letters which shows a constant communication between W. H. Black and Dale G. Ives about the affairs of Black-Marshall?

A. Yes, sir.

Q. And you called him over the 'phone?

A. Many times.

Q. Many times, didn't you?

A. Yes, sir.

Q. And he was the only person that you were keeping informed about the Black-Marshall proceedings there at Aledo? I am talking about you now?

A. I would say that is right.

Q. That is right, isn't it?

A. Right.

Q. And you knew that these stockholders in Aledo depended upon you to inform Dale Ives and Dale Ives inform them, didn't you?

A. I don't think entirely.

Q. And didn't, at one of these meetings, and I think it was the 1944 meeting, but if it was the 1941 meeting you can correct me, didn't you testify yesterday that you told these people you would keep them informed by sending the information to Dale Ives and they could get it from him?

A. I believe that is correct.

Q. That is correct. Now, you did, during these years, as shown by these various letters and telegrams, keep Mr. Ives informed and Mr. Ives received many telephone calls from you and he made visits out here to see you at Wichita and Great Bend, is that right?

A. That is correct.

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[fol. 1299]

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Q. Mr. Black, starting in following your incorporation of Black-Marshall, I think that others have testified, but I desire to ask you, you were elected the President of the company and continued to be the President as long as Black-Marshall existed, didn't you?

A. Yes, sir.

Q. You were a Director of Black-Marshall during its entire existence?

A. Yes, sir.

Q. You were the chairman of the Board of Directors during its entire existence?

A. I think I was.

Q. You were the chairman of the finance committee during its entire existence?

A. Yes.

Q. And you were the chairman of the executive committee during its entire existence?

A. That is right.

Q. It is true, is it not, that while Dale G. Ives was initially named the secretary and treasurer, that all of your books and records, with the exception of the minute book and stock book, were always away from Aledo?

A. Yes, I think that is right.

Q. And where were the books and records and ledgers kept during the existence of Black-Marshall, where did you start keeping them?

A. We started in the Union National Bank Building in Wichita, first, and then we moved up to Great Bend, Kansas.

Q. With respect to the minute book and the stockbook, as I understand, they probably were back and forth from Great Bend and Wichita and back to Aledo, most of the time in Aledo, until about 1942, and then the stockbook and minute book likewise came on to either Wichita or Great Bend, didn't it?

A. I don't remember the exact time. It could have been then.

[fol. 1300] Q. And after the stockbook and minute book left Aledo, say, in 1942 or thereabouts, then those records likewise were always away from Aledo with the exception of maybe just for a period of a day or so at a time?

A. Will you please repeat that?

(The question is read by the Court Reporter.)

A. I believe that is right.

Q. All right. So that insofar as any of these Aledo stockholders having an opportunity to see or examine ledgers and oil runs or these vouchers and the voucher system that you operated, those were not available around Aledo, were they?

A. I don't believe they were.

Q. You, of course, maintained your office first at Wichita with the records and later at Great Bend, is that right?

A. That is right.

Q. You had access to any or all of those records at any time, didn't you?

A. Yes, sir.

Q. And you frequently made an investigation of the various records, didn't you?

A. I couldn't say that I did.

Q. Didn't you ever make investigation to see how much you owed the company?

A. I would when I got my statements, yes.

Q. Or the expense of operation of the company?

A. We did that all the time.

Q. You watched that pretty close, didn't you?

A. I certainly did.

Q. You watched to see how much of the stock was outstanding and in whose name the stock was, didn't you?

A. I didn't pay much attention to that, sir.

Q. Didn't you, early in the history of Black-Marshall, commencing as early as 1942 or at least by 1943, start a campaign to get this stock away from the small stockholders and into the hands of a favored few?

A. I admit that I did start buying some stock from the Chicago group because they were not friendly to us and I did buy what stock I could up there.

Q. And reported and recited in your letters to and from various parties that you wanted to get the stock out of the hands of the small stockholders, didn't you?

A. No, I can't say that I did.

[fol. 1301] Q. Very well. I will take up another matter and return to that. Now, with reference to your method of keeping the stockholders at Aledo advised about the matter, it is true, is it not, that initially when you started out Black-Marshall you had this Aledo group which had been the old Petroleum Investment Company as one nucleus of stockholders and you had what we will call the Chicago group of the landowners as your other nucleus of Black-Marshall stockholders?

A. That is right.

Q. And those two groups composed practically the entire, or at least the majority ownership, of Black-Marshall, initially?

A. That was all of the outside stockholders except the local people I believe.

Q. Yes, sir. Now with reference to keeping the Aledo people advised as to the progress and condition of Black-Marshall, you continued after incorporation to use Dale Ives as your representative to inform those people for you of the conditions of the company, didn't you?

A. I did the best I could to give them that information.

Q. For example, calling your attention to Plaintiff's Exhibit 70, dated January 23, 1940, did you not wire Dale Ives at Aledo, Illinois:

"In three feet Weber Number 1 looks like nice well. Will probably be four or five days before test can be made. Regards, Bill Black."

You sent such a wire, did you not?

A. I think I did.

Q. And that was for the purpose of advising the people at Aledo of the condition of this Weber well which was the second well to be drilled on the Kansas acreage?

A. You can assume that if you like. I don't know.

Q. Well, I will ask you.

A. It was for Mr. Ives' information.

Q. Oh, just for Mr. Ives' information alone?

A. I do not say it was just for his information.

Q. I beg your pardon.

A. It was for Mr. Ives' information.

Q. You intended that he would convey that information to those people there who had just gone into this company, didn't you?

A. To anyone who associated up there.

Q. Yes, sir. Do you recall a little later, in February [fol. 1302] of 1940, writing Plaintiff's Exhibit Number 72 to Dale Ives, the letter in part, at least, reading:

"Dear Dale: Since writing to you yesterday, the thought comes to me that it might be wise to employ the services of a good, substantial, and reliable man to come up to Illinois and work with you or under you, and through our associates up there and their connections to raise the money we are going to need, as outlined in my letter to you yesterday."

Do you recall writing such a letter to Mr. Ives?

A. I believe I do.

Q. Well now, you say there that you think it might be wise to employ the services of someone to come up and assist Mr. Ives in raising money through his associates up in Illinois?

A. Yes.

Q. You had that in mind, did you?

A. Yes. We never did it though.

Q. Do you construe this letter to mean that you had been relying upon Dale Ives to raise money in that vicinity?

A. Yes, sir.

Q. Very well. Now with respect to the operations of Black-Marshall you did have, from time to time, appraisals made of your properties, did you not?

A. Yes.

Q. Mr. Black, handing you what has been marked Plaintiff's Exhibit 356, I will ask you if that is one of the early appraisal reports on the Black-Marshall properties?

A. I believe it is.

Q. That appraisal was made by the firm of Lerke and Whortan of Wichita, Kansas, was it not?

A. That is correct.

Q. Made at your request and for the use and benefit of the Black-Marshall Company?

A. Yes, sir.

Q. And either this report or copies of it were a part of the company records, weren't they?

A. That report, sir, was made to borrow money from the bank on.

Q. Yes, but it was made at your request?

A. Yes, sir.

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[fol. 1303]

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Q. Now, then, I further want to ask you if you recall writing a letter to Mr. Dale Ives on or about April 21, 1941, which has been marked by the Clerk Plaintiff's Exhibit Number 357. Will you examine that photostatic copy and state whether or not you wrote that?

A. Yes.

* * * * * * *

Q. Now, in this communication to Dale Ives of April 21, 1941, I will ask you if, among other things, you made these statements:

"We are at last having some nice weather here, however, it rained and snowed all day Saturday in Barton County but clear today. Armer should have a potential on his Hoffman Number 2 by tomorrow, he set pipe on the Pierano Northeast One-fourth 4-16-11 Saturday should drill plug tomorrow, it looks like a good well in the K.C. This gives us a chance at the Topeka-Dodge K. C. silicious and Gorham sand. Our luck and judgment is still most encouraging. We must be living right. The well north of our Stafford County leases is running high and we will soon know the answer. Clark and Deering are both in Tulsa today, each working on separate deals, *its* too early to tell you about them, but should they shape up, I will write you the details. We will as you know be forced to drill the Krier Number 2 and will start as soon as the Hoffman Number 2 is completed. [fol. 1304] Our oil sales for the month of March was $9,180-.00 and should be about $9,600.00 for April with a good well to add to the Hoffman and another on the Krier our income will jump to around $160,000.00 or $170,000.00 per year. I have the auditors checking our operating statement, to learn whether or not we will have to drill any more wells before the 31st of July to meet our tax situation. I personally believe we can avoid paying any federal tax this year by making the proper charge-offs, and we should start on a dividend basis, dating from August 1, 1941. I favor a *simi*-annual dividend in preference to quarterly, the bookkeeping more simple and the dividend checks more imposing.

"The fish came while we were in Texas but Frances put it in the icehouse and kept it frozen. So last Friday night we had our banker and his wife, our attorney and his wife for a big fish dinner and I wish you could have been there to have seen us enjoy it. A fish like the one you sent is rare in this part of the country. I do want to thank you very much for sending it and assure you we did enjoy it very much. We also had enough to divide with some of our closest friends and we all wish to thank you for your trouble.

"I will keep you advised on the drilling and can assure you that we will be completely out of the woods, when and

if the Hoffman 2 Krier 2 are producers, as we could liquidate our obligations very quickly and pay big dividends if we never find another barrel of oil—and that, Mr. is a very happy feeling.

"I hope you and the family are all well and things are going well with you. We are all in the best of health and looking forward to seeing you this summer.

"Sincerely,

"BILL."

Now, I notice in connection with this letter in the spring of 1941, you report to Mr. Ives about the different wells that are being drilled, the amount of income per month, the expected income per year. That was right, wasn't it?

A. Yes, sir.

[fol. 1305] Q. And you suggest to him that we should start on a dividend basis, dating from August 1, 1941?

A. That is correct.

Q. Did you sincerely feel that you could start on a dividend basis?

A. If we didn't drill no more wells, yes, sir.

Q. And did you anticipate that this information about dividends would be communicated by Dale Ives to the Aledo stockholders?

A. It had already been communicated to them.

Q. Now coming down to 1943, I invite your attention to Plaintiff's Exhibit Number 17, being your letter to "Dear Allen", dated 6-26-43. Now, who was Allen?

A. Allen James, who represented the Bards and their interests in Chicago.

Q. That is, your contacts with Allen James with reference to the Chicago stock was somewhat like your contact with Dale Ives for the Aledo stock?

A. I would say it was.

Q. Yes, sir. Now I am inviting your attention to Plaintiff's Exhibit Number 17.

"Dear Allen: Since talking to you on the 'phone, the thought struck me that you may have a chance to pick up some quick money if you give the matter of B-M stock some immediate attention.

"If your clients won't accept your bid see what they will take, and get a little time so I can try to work it out.

"I know you want to make some money, and you know I would like to see the stock in friendlier hands. So get busy and see what you can do. We both have a reason.

"Sincerely,

"BILL."

Q. You remember sending that communication, do you not?

A. I do.

Q. Now I notice you first start out and say "Dear Allen: Since talking to you on the 'phone". Did you have telephone communications with Mr. Allen James as you have related you had with Dale Ives?

A. Sometimes, yes. He was calling or he would call [fol. 1306] me trying to find a market for the stock.

Q. And I notice that you say if he wants to pick up some quick money to give this Black-Marshall stock immediate attention?

A. Yes, sir, he was a stock broker.

Q. Now, what was your plan of making quick money on Black-Marshall stock there in 1943 at the time you wrote this letter?

A. Paying him a commission.

Q. You were going to pay him a commission?

A. That is right.

Q. And that is what you meant by him picking up some quick money?

A. That is right.

Q. Who was going to purchase this stock?

A. I had no idea.

Q. Who was going to furnish the money to pay this commission?

A. Whoever bought the stock.

Q. Well, you don't mean to tell us that you were having Allen James go out and try and corner stock and agreeing to pay him a commission and not having any purchaser in mind, do you?

A. I would get one, I always did.

Q. You did. Do you know who you had in mind at this particular time?

A. Yes, the Aledo group wanted to buy some. They wanted to pick up some after I told them about it and they did.

Q. I see. Now, I notice you say "I know you want to make some money and you know I would like to see the stock in friendlier hands."

A. That is right.

Q. What was wrong with Mr. Bard and his brother?

A. Well, they were very antagonistic all the way through our deal, to me, and to the deal, and they were not cooperative like everyone else was.

Q. Why the Bard family is as outstanding a family as the Cabots and the Lodge and some of those old established families in the United States, weren't they?

A. That still doesn't mean they were friendly to me.

Q. You want to tell the Court you considered the Bards of Chicago unfriendly stockholders?

A. To me.

Q. As a matter of fact, you considered them unfriendly because they had first detected and stopped you taking that Black, et al, stock?

A. I do not mean that at all, sir.

[fol. 1307] Q. They were the people that had discovered that, weren't they?

A. Mr. James mentioned it, yes.

Q. Allen James is the man that discovered that?

A. He was a Director, yes, sir.

Q. And once he discovered it the Bards hired attorneys to look into the matter, didn't they?

A. I don't know that they hired any attorney.

Q. I see. But anyway, by 1943, you considered that you would like to get that stock away from them and in friendlier hands?

A. That is correct.

Q. Very well. Now, coming down to September, 1943, I will ask you if this letter was sent to Allen James on September 9, 1943, Marked Plaintiff's Exhibit Number 22, has any significance?

"Mr. Allen M. James, 1713 North Park Avenue, Chicago, Illinois.

"Dear Allen: —in regard to the additional stock mentioned in your letter of September 4th, I believe I could dispose of some more of this stock for you if you could get me a firm commitment. I feel sure, however, that my friend who purchased the last stock would not be willing to buy any more at that price, but I can possibly get someone else to take it, and feel sure that I can. You might let me hear from you at your earliest convenience and I will give the matter my prompt attention.

"Yours very truly,

"BLACK-MARSHALL OIL COMPANY,
"W. H. BLACK."

You were sending that communication and you recall sending that, do you not, sir?

A. Yes, I think I did.

Q. I notice that you mention in this letter of September 9, 1943, "I feel sure, however, that my friend who purchased the last stock would not be willing to buy any more at that price." Who was this friend that you were having purchase this stock?

A. I can't tell you right now. I don't remember.

Q. As a matter of fact, it was Bill Black, wasn't it?

A. It could have been.

Q. Yes, sir. Now let's go to a communication a little [fol. 1308] later on, dated 7-29-43, being a communication from yourself to Allen James, marked Plaintiff's Exhibit Number 21 and omitting the first part of the letter and getting down to the matter in question:

"In regards to the purchase of additional stock I suggest we discontinue the idea until we have completed our new financing, then the picture will be clearer. I just returned from New Mexico yesterday, and found your drafts were taken care of during my absence from the office.

* * * * *

"I would be glad to hear from you at your earliest convenience. Should I make a commitment here I will advise you.

"Sincerely,

"BILL."

Do I take it from this letter that on or about 7-29-43, that James was sending you stock with drafts attached?

A. Yes, he was sending it faster than we could pay for it.

Q. You were using company funds at that time to pay for that stock, weren't you?

A. I don't believe I was, I don't think so.

Q. What disposition were you making of that stock?

A. I would have to look at the stock record to tell you, sir.

Q. Were you continuing to pay Mr. James a commission for acquiring that stock?

A. I think he got a commission on everything that he acquired.

Q. How much of a commission were you paying him?

A. Either fifty cents or a dollar a share, I am not sure which.

Q. So whenever he acquired, say, 10,000 shares from Roos or Gill, or whoever he may have acquired it from——

A. He didn't acquire any stock from Roos or Gill.

Q. He didn't. But it was fifty cents a share?

A. I am not sure. I believe it was either fifty or a dollar.

Q. And you used company funds to pay that commission——

A. I don't think I did.

Q. You do not think you did?

A. No. I would have to see the records.

[fol. 1309] Q. All right. Now coming down a little further to another letter that you sent to Mr. Arthur W. Kincade. The date of the letter is missing. It just says: "Saturday", but I think the body of the letter will help us to identify the date. It is Plaintiff's Exhibit Number 112.

"Dear A. W. K.: Enclosed is copy of a letter to Dick Gill. I hope it meets with your approval. Dale Ives arrived here yesterday with the stock, so we can make delivery when and if the deal is consummated."

Going a little further in the letter:

"If Messrs. Gill and Roos wish to purchase the Illinois stock and Deering too, you should advise me as soon as possible so that I may be able to go to work on Deering. He is, as you know"—no,

"He, as you know, is going to be no easy person to deal with."

And then some personal remarks and signed,

"BILL."

You did send that communication to Mr. Kincade, did you not?

A. I presume I did.

Q. Now I notice that you state there to Mr. Kincade that Dale Ives arrived here yesterday with the stock so that you could make delivery when and if the deal was consummated. What stock did Mr. Ives bring to you at the time you wrote this letter?

A. That I couldn't say, off-hand. I would have to look at the records.

Q. Wasn't that the first batch of stock that Mr. Ives brought to you in 1944?

A. I rather believe it was but I can't tell you without some records or something on it.

Q. And I notice that you mentioned that you were enclosing a copy of a letter to Dick Gill. Who was Dick Gill?

A. Dick Gill was a friend of Mr. Kincade.

Q. Where did he live?

A. I think he lived at San Antonio, Texas.

Q. What was Mr. Gill's occupation?

A. He is an investment and real estate and bonds, I think, and securities—he is a trader.

Q. He deals in stocks and bonds and an investment banker, doesn't he?

A. I think so.

[fol. 1310] Q. And you mentioned in this letter a man by the name of Roos?

A. Yes, sir.

Q. Who was Mr. Roos?

A. He, too, was a large investor.

Q. Mr. Roos was an investment banker of New York City, was he not?

A. I think he was.

Q. How have you gotten in touch with Mr. Gill and Mr. Roos?

A. Through Mr. Kincade.

Q. And what was your purpose in contacting Gill and Roos?

A. I didn't contact them. They contacted me.

Q. All right. What was the reason for making the contact with Gill and Roos at all?

A. They were out to see our properties and were interested in buying into our company.

Q. That is, Mr. Kincade sent you a note one day saying that a young fellow had been in to see him from New York that had about four million dollars he wanted to invest, didn't he; you remember that?

A. I can't say that I remember it. It could be true but I don't remember it.

Q. And that led up to the fact that either you or Kincade got Gill and Roos interested in buying some stock in Black-Marshall?

A. Yes.

Q. And you got them interested in buying this stock in 1944, didn't you?

A. I believe it was, yes.

Q. And after you got them interested in buying the stock then your next step was to get some stock to transfer to them, wasn't it?

A. Why certainly.

Q. All right. Now where did you start out to get the stock that you intended to deliver to Gill and to Roos?

A. I did not start out to get any stock from anybody. The people wanted to sell their stock and I was trying to find a market for them, sir.

Q. Now, let's see if we can't boil this down to concrete facts. This stock that these people here who have testified they were told by Dale Ives in 1944 that you wanted half of that stock in order to bind a deal, that is the stock that you are referring to in this letter, Plaintiff's Exhibit 112, that was brought in by Dale Ives, wasn't it?

A. I don't know what you are talking about, about the fifty percent of the stock?

Q. Well, I am coming to that pretty soon. Perhaps I had better go to that first.

A. All right, sir.

Q. Then maybe it will be a little clearer for us to follow.

[fol. 1311] Let's go to this matter of the fifty-one percent of the stock. Do you know Mr. Earl Hatcher?

A. Yes, sir.

Q. When did you first become acquainted with the gentleman?

A. During that interim. I imagine in early 1944.

Q. And who was Mr. Hatcher?

A. He was attorney for the National Co-op.

Q. How frequently would you see him during 1940 and 1945?

A. I wouldn't say how frequently but it was quite often.

Q. And what different places did you see Mr. Hatcher?

A. I think always in my office at Great Bend, or the hotel.

Q. Well, isn't it true that during 1944 and 1945 you met Mr. Hatcher here in Wichita?

A. Could have.

Q. You met him in the presence of Mr. Kincade several times, didn't you?

A. I don't know, sir.

Q. You went to New York once with Hatcher, didn't you?

A. Yes, after we had made a loan, been doing business with him.

Q. You went to Washington, D. C. with Mr. Hatcher?

A. I sure did.

Q. Met him at Great Bend?

A. Yes.

Q. You met him in Kansas City?

A. I was with him in Kansas City.

Q. That is right. What I am getting at, for the Court here, is that you had frequent meetings at various places with Earl Hatcher about the Black-Marshall Company, didn't you?

A. I certainly did, sir.

Q. And you were working on Mr. Hatcher to either sell the producing properties or to get a loan, weren't you?

A. That is right.

Q. That was the thing you were trying to accomplish. Mr. Hatcher, in turn, was working on Black-Marshall, through you, to get some production for the refinery?

A. Yes, sir, it worked both ways.

Q. It worked both ways. And your desire to sell producing properties and his desire to get a reserve of production brought you two gentlemen together numerous times, right?

A. That is correct.

Q. Now then, I call your attention here to a communica-
[fol. 1312] tion which Mr. Hatcher says that he wrote to Mr. Howard A. Cowden of the Cooperative Refinery Association at Kansas City, Missouri; and a copy to J. L. Nolan, to the Farmers Union Central Exchange, St. Paul, Minnesota; a copy to Mr. William Limatainen, of Jacobson, Minnesota; a copy to Mr. Walter Graham, Midland Cooperative Wholesale in Minneapolis, Minnesota; a copy to Mr. C. McCarthy, Farmers Union State Exchange Association of Omaha, Nebraska; and to Mr. E. J. Mary, National Cooperative Refinery Association, at McPherson, Kansas, on May 8, 1944. It is marked Plaintiff's Exhibit Number 344.

In this letter, among other things, Mr. Hatcher wrote his people as follows:

"I have done considerable work on the Black-Marshall deal during the last week and finally worked out the deal on this basis: We would loan Mr. Black $1,400,000.00 at the present time and the balance of the money would be loaned to him on the basis of $22,000.00 for each new well which he brought into production. We would take 60 percent of the gross on all of his production to pay off the mortgage. In order that we have complete control of the oil so that there can be no contention made but what the oil belongs to us, I made an arrangement with Mr. Black where he was to assign us fifty-one percent of the stock."

Now, Mr. Hatcher says he made such an arrangement with you as of that date and my question to you, sir, is that correct?

A. That is not correct.

Q. You say that Mr. Hatcher in this letter and his statement from the witness stand is not telling the truth about that arrangement?

A. We never made any arrangement for fifty-one percent of the stock, to turn over fifty-one percent of the stock. We never did it, so I don't know how you——

Q. I am not asking you if it was consummated now. I want to be fair with you. But I do insist upon this: As of May the 8th, 1944, did you make an arrangement at that time? Now, later it may have been disregarded, set aside, but I am asking you did you make such an arrangement?

A. We made so many different arrangements that if we made that I don't recall it, sir.

[fol. 1313] Q. Will you say it was not made?

A. I won't say that we didn't do it but I don't recall.

Q. Would it be possible that this arrangement that you made with Mr. Hatcher to assign Co-op fifty-one percent of the stock was communicated to Mr. Ives and he in turn communicated to these people that they had to turn over fifty-one percent of that stock to you?

A. It could have been, but I don't believe it was.

Q. Well now, let's see if it was or not. That letter of Mr. Hatcher's that I have called your attention to was dated May 8, 1944. I want to add just a little more from his letter.

"It has been my idea that if we had the oil under complete control and ran short there would be no question under the above arrangement but what we could take it. If we could not take it, Phillips, if they continue to take the oil, would have to pay us on the same basis that they are charging for oil which they deliver on requests of directives. Mr. Alberding's letter suggesting that there will be no sweet crude available for directives leads me to believe that we have to make even greater effort to get sweet crude under our control."

Now, you did know that there was this shortage of sweet crude, didn't you?

A. I have no control over what kind of letters Mr. Hatcher writes to his company.

Q. I appreciate that, sir, but Mr. Hatcher testified from the very witness stand that he wrote this letter and that at that time he had this arrangement and that it was later, or that it later fell through with.

Mr. Siefkin: Just a moment. I object to that as not a correct statement of the fact. He did testify he wrote the letter but he didn't testify any further than that.

Colonel Walker: All right.

The Court: Yes, I think that is correct.

Colonel Walker: All right. Your Honor, I don't mean to argue with the Court, but I don't want Mr. Siefkin's statement in the record to go unchallenged. It is my recollection that Mr. Hatcher, after considerable examination, finally stated that that arrangement was made but that in a [fol. 1314] few days, I think in about ten days, that it fell through with or something. I am not trying to argue the matter now.

The Court: All right.

Q. Now, that letter appears to have been on the 8th of May, 1944. I will ask you, Mr. Black, if you didn't send a letter to Mr. Dale Ives on May 18, 1944, which would be ten days later, which is Plaintiff's Exhibit Number 123, wherein you made the following statements:

"Mr. Dale, Ives, Aledo, Illinois.

"Dear Dale: I received your letter of May 14 this morning and beg to advise that I have just returned from Kansas City, leaving here yesterday morning and getting back about two o'clock this morning.

"I spent the day with the Co-op and, in order to find out just exactly what they could or could not do, I went into the matter very thoroughly with the attorneys for that company, the President of the Co-op bank and attorneys for the bank. They have convinced me that they are very sincere in their desire to carry out the original proposition."

Now, what was the original proposition?

A. Loan us $1,400,000.00. I mean eight hundred thousand and $22,000.00 a well.

Q. That is that original proposition is the one that Hatcher mentioned in his letter of May 8th?

A. We had been talking weeks and weeks before that time. That was not the original proposition.

Q. That is not the original proposition?

A. That couldn't have been.

Q. All right. "They have convinced me that they are very sincere in their desire to carry out the original proposition, also that the same can be done some time in the near

future. The best way to make this possible would be for us to start doing some business with them; that is to say, we to turn over a few of our properties to them under their loan agreement and have a connection with them so that from time to time the transfers of the various properties may be made without creating too much publicity."

A. That is correct.

Q. Now, what was there that you were trying to avoid [fol. 1315] publicity about?

A. Getting the oil transferred to them from the directives. Connections were all frozen.

Q. I still don't understand why you just wanted to make these assignments from time to time and not create publicity. What was wrong about Black-Marshall selling their oil?

A. We couldn't sell it to them. The Government had it frozen with the directives. We had, on some certain date, I can't remember the exact date, but I think it was February 1, 1943, I believe——

Q. Then your idea was to try and work some arrangement where the Government wouldn't know that you were violating one of those freeze orders?

A. The Phillips Petroleum Company, sir. The Government didn't care who had it. The Phillips would not release it because it was frozen.

Q. All right, we will come back to Phillips. Was your idea to try and shift these properties without any publicity so that the Phillips would not know about it?

A. That is correct.

Q. And Phillips had a call upon the Black-Marshall Oil at that time, didn't they?

A. They had no call.

Q. Then why did you want to escape publicity? I don't follow you.

A. Because we had a much better rate with the Co-op than we had with the Phillips. The Phillips didn't loan us any money, the Phillips didn't give us any favors.

Q. I still don't understand why, if you weren't bound to supply the Phillips, why you had to be secretive about selling this oil?

A. I don't think you want to know, sir. You could certainly understand that we would like to do business with people who would be cooperative and would do some financing for us rather than people who would not do any financing for us, wouldn't you? We had to have financing and the Phillips would not finance us, sir, or even any part of it.

Q. And that is your explanation of why you wanted this handled——

A. That is my explanation.

Q. —without any publicity?

A. That is my explanation.

Q. Now did you further say to Mr. Ives: "I wish you would prepare a Directors' Authorization permitting me to consummate a deal with the Co-op." Do you remember making that statement?

A. I expect I did. I would do it over again, sir.

[fol. 1316] Q. Is that the way that you handled your Directors' meeting?

A. He prepared them, yes, sir.

Q. In other words, you never really had a meeting at all?

A. I'll——

Q. You just would write him and tell him you wanted to do something and to show it as of a Directors' meeting being held and you were authorized to do it?

A. I understand that is the way most people do, most companies do.

Q. All I am asking you is, how you carried out the work of your company, sir?

A. I would say that that is self-explanatory.

Q. That is self-explanatory. And that was typical of the way many of these things were handled, wasn't it?

A. I wouldn't say, many of them. I expect some of them.

Q. Some of them. Now, let's see a little further in this letter to Mr. Ives, Plaintiff's Exhibit Number 123:

"Mr. Marshall was up day before yesterday and I still have hopes that we can consummate a deal with him without any serious complications.

"I have some people due here next week from New York, who are friends of Arthur Kincade and who have a desire to make such an investment as I have outlined to you. If

you would, therefore, write or call me and tell me the number of shares you think could be acquired in Illinois so that I will have some idea as to what we can offer, I will immediately start to work on this transaction.

"I understand that Clark wrote you today and gave you the information on the new well.

"With kindest personal regards,

"Yours very truly,

"W. H. BLACK."

Now, I observe that you say that there are some people coming in from New York. Are you referring there to Gill and to Roos?

A. Yes, I think so.

Q. And, as a matter of fact, they did show up within a few days, didn't they?

A. They showed up. I don't remember just how soon after that.

[fol. 1317] Q. Now I observe that on the day that you wrote to Mr. Ives, this Plaintiff's Exhibit Number 123, which was May 18, 1944, you are telling Mr. Ives that you think, and your words are: "convinced me that they are very sincere in their desire to carry out the original proposition, and also that the same can be done some time in the near future."

As a matter of fact, I notice that on the same day, May 18, 1944, Mr. Hatcher gives this interpretation of your meeting and this is Plaintiff's Exhibit Number 345. He again writes this list of people that he had written on May 8th about the fifty-one percent and has this to say on May 18th, ten days later:

"Gentlemen: We were not able to complete the Black-Marshall deal on the basis which we first discussed because we could not be assured of the oil runs which were developed prior to January 1, 1943."

And then he goes on to tell about working out a new deal where they will advance $22,000.00 cash for each well, and then Mr. Hatcher says:

"It is my opinion that this is a very favorable proposition and should be accepted. Although we will not be able to get all of Mr. Black's oil at this time, it will be available as soon as we can get the consent of P.A.W."

Now, pausing for a moment. Who was P.A.W.?

A. The Petroleum Administrator for War.

Q. Now then, doesn't this refresh your recollection, that the reason you didn't want to create any publicity that I was asking you a moment ago about was on account of this Petroleum Administrator for War?

A. That is just as I got through telling you, sir.

Q. And wasn't the reason, that you were trying to get around the Government regulations and, sir, circumvent them and slip these leases over to Co-op one or two at a time so that it might escape the Government?

A. Certainly had nothing to do with the stock. That is what you tried to infer.

Q. No, I am asking you. Will you read the question to him?

(The question is read by the Court Reporter.)

[fol. 1318] A. That was not the case, sir. You couldn't slip one of them, let alone two or three, you couldn't slip anything out. The ones I am talking about, one or two at a time, were the new wells we were drilling, that we had no contract or the wells that were drilled after January 1, 1943. I could do anything I chose with them.

Q. Now then you were in almost daily, or several times a week, at least, communication with Mr. Ives. That is correct, isn't it?

A. Quite often.

Q. Now then on May 8, 1944, you did have a meeting with Mr. Hatcher of some kind, didn't you?

A. I presume I did.

Q. Is it possible that after you discussed this fifty-one percent matter that you talked to Mr. Ives over the 'phone about it?

A. I don't remember ever talking to Mr. Hatcher or Mr. Ives either about fifty-one percent of the stock.

Q. How soon did you talk to Mr. Ives about acquiring stock in 1944?

A. I talked to him about acquiring stock from the time we started until we got out of business. There was always someone up there wanting to sell some stock.

Q. And you used Mr. Ives as your solicitor to round up that stock in Illinois, didn't you?

A. I didn't use him as a solicitor at all, sir. They were soliciting somebody to buy it all the time. I never wrote him or no one can ever show that I ever wrote him and asked him to buy any stock or get some stock for me. It was never done. The only person I ever wrote to about some stock was Mr. Allen James, in Chicago, sir.

Q. You say that you never at any time, either over the telephone or by letter, or direct communication, told Mr. Ives to get in this Aledo or this Illinois stock?

A. I never told him to get in the stock.

Q. Never at any time?

A. Not at any time unless he had it already and wanted to send it down for distribution.

Q. And all of this $800,000.00 worth of stock that came rolling in from Aledo then was just a complete surprise to you?

A. That was not a surprise. They were trying to sell their stock all the time, sir, and I had to find some place to put it or I couldn't handle it. He had the stock. I think we had the stock a long time before it was paid for even.

[fol. 1319] Q. Mr. Black, let me see if we can help you.

A. Yes, sir.

Q. I am not enjoying putting you on a spot but I am not going to—I withdraw that. It hasn't been thirty minutes since you testified that you testified that you were getting some of the Allen James stock to send out to Aledo because they wanted to buy it out there.

A. That is right, at that price.

Q. Now are you saying that at the same time those people were forcing their stock on you?

A. That is right, at that price, and when they could get $10.00 a share for it they all wanted to sell it. At least a lot of them. There was a lot of difference in the price they paid for that stock and the $10.00 a share, sir.

Q. All right, let's pass on to another matter. Mr. Gill and Mr. Roos did come here to Wichita or Great Bend in

1944 about the time that you mentioned in that letter, didn't they?

A. Yes.

Q. And how much stock did they say they wanted to acquire in Black-Marshall?

A. I don't know what they said they wanted to acquire. They finally bought twenty-two or twenty-three thousand shares.

Q. Well, as a matter of fact, Mr. Roos took ten thousand and Mr. Gill took ten thousand shares of common, didn't they?

A. Originally, yes.

Q. Yes, sir. Now where did you get that stock for Mr. Gill and Mr. Roos?

A. I would have to look at the stock records.

Q. All right, let's take a moment. Which record do you want?

A. The stock analysis record.

Q. Stock analysis.

Colonel Walker: Do you have, Mr. Siefkin, the one you had the other day; is it in evidence?

Mr. Siefkin: It is in evidence.

Mr. Miller: If Your Honor please, I think we have ascertained that it is V-1 if we can find it.

Colonel Walker: I think we can proceed without it perhaps.

[fol. 1320] Q. Mr. Black, I call your attention here to stock Certificate Stub Number 296, Plaintiff's Exhibit Number 102.

A. Yes.

Q. Which shows that there was 25,000 shares of stock went to Gill, Roos and Kincade as of July 27, 1944.

A. All right, sir.

Q. Now let's see if we can look at the stock certificate record and tell how that 25,000 shares—strike that. Tell first where the 25,000 shares of stock came from and second, where it went to?

A. Well, it either went to Roos, Gill or Kincade, this 25,000, so it says on this.

Q. Now isn't it a fact that the 25,000 shares that went to

Gill, Roos and Kincade, came from Amen and Wadleigh and Stites and Robinson and Boyd and McBride and Constant and Danford and Berglund and Sherrard and others known as the Aledo group?

A. I don't think they were all in the Aledo group, sir.

Q. Point out any of the names there that were not connected with the Aledo group?

A. I will read them all—I don't know who.

Q. All right.

A. Hope McKinney, 900 shares.

Q. Hope McKinney was of Aledo, wasn't she?

A. I don't think so, I don't know.

Q. Well I will find out for certain here. I am informed, sir, that she was a cousin of Mr. Ives?

A. Louis Ets Hokin, 300 shares; Roy L. Jones, 200 shares.

Q. All right.

A. Barney Ets Hokin, 300 shares; E. W. Robinson, 600 shares.

Q. Robinson we know is an Aledo man.

A. Yes. A. M. Amen, 100 shares.

Q. And he was out of the Aledo group?

A. H. C. Wadleigh, three different transfers——

Q. He was from the Aledo group.

A. Totaling 1500 shares.

Q. All right.

A. H. D. and/or Larry Stites, 500 shares.

Q. That was of the Aledo group.

A. L. E. Robinson, 1050 shares.

Q. That was from the Aledo group.

A. L. E. Robinson, 700 shares.

Q. That would be of the Aledo group.

A. Earl D. Boyd, 10,000 shares.

Q. He lived at Aledo.

A. Howard W. Riley, 500 shares.

[fol. 1321] Q. He is part of the Aledo group.

A. Mitch Riley, 1,000 shares.

Q. The same is true of him.

A. Mr. Riley worked for us. Edith Hall, 1,350 shares.

Q. She is of Aledo.

A. R. P. McBride, 200 shares.

Q. He is from Aledo.
A. Keny B. Constant, 500 shares.
Q. That is Aledo.
A. T. N. Danford, 2,100 shares.
Q. That is Aledo.
A. William Brown, 100 shares.
Q. That is Aledo.
A. William Brown, 100 shares.
Q. That is Aledo.
A. Spencer Berglund, 500 shares.
Q. That is Aledo.
A. Samuel Nelson, 300 shares.
Q. That is Aledo.
A. Samuel Nelson, 400 shares.
Q. That is Aledo.
A. Mabel Nelson, 1,000 shares.
Q. That is Aledo.
A. Hays Hall, 960.
Q. That is Aledo.
A. Hays Hall, 1,400.
Q. That is Aledo.
A. J. R. Sherrard, 1,110 shares.
Q. That is Aledo.
A. J. R. Sherrard, 2,500 shares.
Q. That is Aledo.
A. Beulah Runborn, 100 shares.
Q. That is Aledo.
A. L. E. Robinson, 250 shares.
Q. That is Aledo.
A. Clarence Stephens, 300 shares.
Q. That is Aledo.
A. A total of 25,000 shares.

Q. So with the exception of, I think about three or possibly four that you named there, we know that the balance of those parties were Aledo people, don't we?

A. I think so.

Q. Now that 25,000 shares that you have just read off, was secured from those stockholders and paid for at how much per share?

A. It was paid for at $12.50 a share, part of it for $12.50 a share. I don't know what the rest was paid, I don't know what was paid for the rest of it.

Q. Well, I probably haven't made my question plain. These Aledo people were paid $10.00?

A. That is right.

Q. And this was part of the transaction where they would send in, say, 1,000 shares and get back a certificate for 500. In other words, they were being relieved of half of their stock voluntarily or otherwise, weren't they?

A. That is right.

Q. Now this 25,000 shares, the bulk of which we agree came from Aledo, you know then that that stock went, 10,000 shares to Roos, 10,000 to Richard Gill and 5,000 to Kincade, don't you?

A. Yes, I think so.

Q. You handled that transaction, didn't you?

[fol. 1322] A. I was in the transaction. I can't say—it was Mr. Kincade's deal but I am not quite sure whether I would say I handled it or he handled it. One of us handled it.

Q. And you sold that stock for $12.50 a share, didn't you?

A. 20,000 shares at that.

Q. You made a quick profit of $50,000.00 on that stock that you got from that Aledo group, didn't you?

A. No, sir.

Q. Well, if you made $2.50 a share profit on 20,000 shares what would that amount to?

A. I didn't make $2.50 a share on it.

Q. You sold it for $12.50, didn't you?

A. Yes, but I didn't get the money.

Q. Well, who did get the money?

A. I think Mr. George Heiser in New York, who brought them in to Mr. Kincade, got part of it and Mr. Kincade got part of it and I got some of it I believe, I am not sure, or else I discounted some additional stock to Mr. Kincade. I am not sure. I know I made no money in it that I can ever recall out of the whole transaction. I made a little money on some of the deals but I lost considerable money on others.

Q. Well, somebody made $62,500.00 on that one turnover, didn't they?

A. No.

Q. Maybe my mathematics are wrong. You got 25,000 shares at $10.00?

A. The 5,000 shares didn't sell for $12.00, sir, or twelve and a half.

Q. What did you get for the 5,000 that went to Kincade?

A. I am sorry, I have got it in the records. My accounts would have to show me that.

Q. All right, let's take a moment and find out.

A. I think Mr. Kincade paid $7.00 for his stock, I believe, the 5,000 shares.

Q. Do you mean to say that you were paying $10.00 for stock and turned right around and selling it for $7.00? Now that isn't quite what was going on, was it, Mr. Black?

A. I beg your pardon.

Q. You don't want to tell the Court that you were paying out $10.00 a share for big chunks of stock and turned right around and selling it for $7.00, as an individual, do you?

A. I think I did, sir.

Q. And you want the Court to place full credence in that, do you?

A. I certainly do.

[fol. 1323] Q. All right, let's forget about that five thousand.

A. But the other twenty thousand was sold for $12.50.

Q. $12.50?

A. Yes.

Q. All right, who got the $50,000.00 commission?

A. Well, I think 1,000 shares of that stock went to Mr. Heiser for a commission.

Q. All right.

A. The balance of the commission of the 20,000 shares was divided equally between Mr. Kincade and myself, sir.

Q. Now then, you knew, as a matter of fact, that along about the 8th day of May, 1944, about the same time Hatcher wrote that letter to his people, you knew that you had told Dale Ives that you had a deal practically made and you wanted in half of that Illinois stock so that you could bind the deal or show good faith, didn't you?

A. I did not, sir.

Q. You know that Mr. Ives so testifies that, don't you?

A. I don't care what Mr. Ives testified. He was trying to sell the stock all the time. They had to have money,

they had notes and obligations due and he called me and wrote me time after time to find a market for that stock.

Q. Did it ever strike you as being peculiar that everybody in that community would suddenly get hard-up and suddenly want to sell, but only wanted to sell half of their stock; didn't that strike you as a most peculiar thing?

A. No, it certainly didn't, because if they sold half of their stock they would get a great deal more than all of their money back, every one of them.

Q. And it never struck you peculiar that people in Aledo and Rock Island or Moline, these little surrounding towns, all at once became obsessed with the idea of rushing in and just selling half of their stock to you, that never struck you as peculiar, did it?

A. They always wanted to sell some stock, from the time we had the meeting on January 1, 1944, from then on, every time I would hear from them they wanted to sell some stock, sir, and when the price got up to $10.00, above the $8.00 a share, they were very happy to sell their stock.

Q. Mr. Black——

A. We had quite a few of those people who came down to see us after that and they were happy people over it, sir.

Q. Do you realize, Mr. Black, that you have heretofore [fol. 1324] testified on numerous occasions that you did get in touch with Dale Ives and urged him to get in the stock and you were trying to get in stock from any source that you could?

A. I can't say that I ever testified that I ever urged Mr. Dale Ives to get in one share of stock, sir.

Q. Very well.

A. I would like to see it, sir.

Q. Calling your attention to page 227 of the transcript of the trial proceedings in Blazer vs. Black, Number 3467, and I will ask you if you were asked these questions and gave these answers:

"Q. You purchased quite a block of stock through Dale Ives, did you not?

A. Do you mean me personally or the company?

Q. I mean you communicated with Ives to get the stock in, did you not?

A. I would say yes, yes.

Q. And when you communicated with Ives to get this stock, what stock did you refer to?

A. Well, the only stock that Mr. Ives had connection with was his own friends up in Aledo, the people that joined him, and went in with us."

Were you asked those questions and did you give those answers?

A. Yes, sir, I can still answer that, sir.

Q. Well, does it refresh your recollection then that you did communicate with Ives and urged him to get that stock in?

A. I didn't urge him to get it in. I told him after I found a buyer to send in the stock, yes, sir.

Q. Did you tell Mr. Ives in 1944 that you had made a deal?

A. That I had made a deal?

Q. To sell the producing properties of Black-Marshall?

A. I might have told him a dozen times. We thought we had a half dozen deals made.

Q. The question is: Did you tell Mr. Ives that you thought you had a deal to sell the producing properties in 1944?

A. I can't say that I did.

Q. Will you swear that you did not tell him?

A. I will not swear that I didn't, sir.

Q. As a matter of fact, haven't you testified on occasions other than that that I asked you——

A. Your dates are confusing me, sir. I can't remember that far back.

Q. Well perhaps we can get those made plainer in a moment. Now I will ask you, directing your attention to page 227 of the transcript of trial proceedings in the case [fol. 1325] of Blazer vs. Black, if you did not make this further comment, an additional answer to the one I just read and immediately following:

"The only people that—" meaning Dale Ives— "He had any stock connection with that I know of was his own group in Aledo and that is the stock that we were trying to sell all the time."

A. That is correct.

Q. All right.

A. We were trying to sell it for them all the time. I will still admit that. I will not take that back, sir.

Q. You were——

A. I will admit it.

Q. You were trying to sell Gill or Roos——

A. Or anybody that would buy it, sir, anybody that would buy it.

Q. You were willing to take it from anybody if you could turn it for $2.50 a share profit, weren't you?

A. I didn't make a turn of $2.50.

Q. Very well. Now, let's go a little further here. You state that these people were all clamoring to get rid of stock in Black-Marshall, or most of them there, including some of these names that you read. Let me call your attention, Mr. Black, to Defendant's Exhibit A-3.

A. Yes, sir.

Q. Being a letter from Dale G. Ives to the Black-Marshall Oil Company on December 21, 1943.

A. Yes.

Q. That was almost the beginning of 1944, wasn't it?

A. Yes, sir.

Q. I will ask you if in that letter Mr. Ives doesn't say, "Enclosed find check for $4,900.00"?

A. Yes, sir.

Q. —"for 700 shares of Black-Marshall Company stock purchased in Chicago. This stock should be issued as follows: Howard Riley, Aledo, Illinois, 300 shares; Clarence and/or Nancy Stephens, 200 shares; William Brown, Aledo, Illinois, 100 shares; Fred O. Brown, Aledo, Illinois, 100 shares; Yours very truly, DALE G. IVES."

A. That is right. They bought the stock at $7.00 a share. They have testified they thought they were going to get a big three-dollar dividend in January and didn't get it and two months later they could sell it for $10.00 a share. I would say they wanted to sell it.

Q. Now, those names on this Plaintiff's Exhibit, or Defendant's Exhibit A-3, all of them appear on that stock cer-
[fol. 1326] tificate of the 25,000 shares that went to Gill, Roos and Kincade?

A. I think so, yes.

Q. And you want to tell the Court that these people who were buying this stock in the fall of 1943, December of 1943, were clamoring to sell it to get money in 1944, do you not?

A. I would say that.

Q. That is your statement?

A. That is what I thought. They sold it for a nice profit.

Q. Now let's look at Defendant's Exhibit B-3, being a letter from Dale Ives to Black-Marshall Oil Company on December 27, 1943. That is getting pretty close to the start of 1944, isn't it?

A. That is right.

Q. And did Mr. Ives in that letter of December 27, 1943, state: "Enclosed find check for $2,135.00 for 305 shares of the common stock of the Black-Marshall Oil Company purchased in Chicago. 200 shares of said stock should be issued to Howard Riley and 105 shares should be issued to Harry Ogle, both of Aledo, Illinois."

You knew both of those parties there, didn't you, by name, Howard Riley and Harry Ogle?

A. Yes. I don't know Mr. Ogle very well. That, too, was bought for $7.00 a share before the meeting in Aledo.

Q. Now along about that time, in the fall of 1943, in the early spring of 1944, you were communicating also with Dale Ives about reorganizing the stock structure of the company, were you not?

A. What date?

Q. Well, here is February 22, 1944, a letter from yourself to Dale Ives.

A. Yes, that is right.

Q. And which has been introduced by the Defendant as Defendant's Exhibit D-3. You kept Mr. Ives advised about all these matters of changing the corporate structure and the loans and the attempts to sell the company, didn't you?

A. Yes, sir.

Q. You kept him advised as to who you were trying to sell the company to, is that right?

A. Yes, sir.

Q. And the price that you expected to get for it?

A. That we hoped to get, yes.

Q. And whether or not you were selling the producing properties or the leases or the oil or whether you was mortgaging it, those matters were communicated by you to Mr. Ives?

A. Yes, sir.

[fol. 1327] Q. And you knew and intended that he would pass that information on to the Aledo people, didn't you?

A. I hoped he would.

Q. Calling your attention now to Defendant's Exhibit D-3, dated February 22, 1944, addressed to Mr. Dale Ives, Aledo, Illinois, and I will omit the first part of the letter and get down to the matter in point:

"Quite a few of the more successful independent companies have completely reorganized their stock and financial structure within the past few months, and unless I am badly mistaken, it was done for just the same identical reason. If you think the above proposal has merit, my plan would be to increase capital structure to one million shares of $5.00 par value common stock. This would give us a $5,000,000.00 corporation, we to offer each present shareholder two shares of new for one share of old stock."

May I pause there a moment? You had in mind then enlarging the structure of Black-Marshall so that you could issue two shares for one, didn't you?

A. Yes, sir.

Q. And you communicated that to Dale Ives, didn't you?

A. Yes, sir.

Q. And you know, as a matter of fact, that he, in turn, communicated it on to the people in Aledo, do you not?

A. No, I do not.

Q. You have heard some of these people——

A. I don't think the thing ever went any farther than that letter, sir.

Q. I see. But you had that in mind and were discussing it with Mr. Ives?

A. Yes, I would do that again. I am awfully sorry that we didn't do it at the time, go through with it.

Q. And you told Mr. Ives in the spring of 1944 you were thinking of enlarging the corporate structure so that there could be two shares issued for one, didn't you?

A. There was no way to make a big company any other

way, sir. We were under capitalized and we couldn't take any outside properties any other way.

Q. My question is this: You did inform Mr. Ives that you were thinking of increasing this structure, stock-wise, so that you could issue two shares for one to your Black-Marshall shareholders?

A. Yes.

[fol. 1328] Q. Very well. Now then, coming back to the letter that I started to interrogate you about a few minutes ago when we got off on that fifty-one percent discussion. I am now inquiring of you, sir, concerning Plaintiff's Exhibit Number 112, being your letter to Arthur W. Kincade at the time that Gill and Roos were dickering for that stock. I will go over the two paragraphs, they are short, once more.

"Dear A. W. K.: Enclosed is a copy of letter to Dick Gill. I hope it meets with your approval. Dale Ives arrived here yesterday with the stock, so we can make delivery when and if the deal is consummated."

Now this begins to tie in together. This is the stock that was bought by Mr. Ives that went to Gill, Roos and Kincade, we are talking about, right?

A. Yes.

Q. All right. Now continuing in your letter to Mr. Kincade: "If Messrs. Gill and Roos wish to purchase the Illinois stock and Deering too, you should advise me as soon as possible so that I may be able to go to work on Deering. He, as you know, is going to be no easy person to deal with. Sincerely, BILL."

That is, it was your intention that if these investment brokers from New York wanted more stock you were going to work on Deering Marshall to get his stock, weren't you?

A. That is correct.

Q. Yes. Deering Marshall had been your partner?

A. That is correct.

Q. He was with you in Black-Marshall?

A. That is right.

Q. He had worked with you towards building up this company?

A. That is correct.

Q. And yet you were planning on working on him to get his stock and turn it to some investment brokers in order to make two and a half a share?

A. No, I was going to let them buy direct from him if we could. Deering wanted to sell his stock.

Q. I see. Well now, then in April of 1944, I call your attention to another communication from yourself to Allen M. James, marked Plaintiff's Exhibit Number 23.

[fol. 1329] "Allen M. James, 1713 North Park Avenue, Chicago, Illinois.

"Dear Allen: I have not heard from you for quite some time now, and I am wondering if you have given up the idea of acquiring the additional stock we talked about. I didn't want to approach any of these people personally unless you had exercised every possible effort to acquire same. If you do not feel you can be of any further service in this matter, please advise me and I will try a direct contact with Mr. Ball as I would like to close up the issue or forget it entirely. I might also add that we are going to call the outstanding preferred stock, and the only one of your group who has any is a few shares held by Mr. Ball.

• • • • • • •

"I hope everything is going along well for you and that you have your new venture well organized and underway. It is quite possible that I will be in Illinois within the next two weeks, and if I do get to Chicago, I will enjoy seeing you. In the meantime, please let me know what you think of the above proposal at the earliest possible date. Kindest regards,

"Yours very truly,

"BLACK-MARSHALL OIL COMPANY,

"BILL BLACK."

Now, who was Mr. Ball?

A. Mr. Ball was a gentleman that lived in Muncie, Indiana, I believe, some place in Indiana. He was one of the Landowners group.

Q. And he had both common and preferred stock, didn't he?

A. No, I think he just had common. He had had preferred and I think he had converted it.

Q. Well, now, I see that you are reminding Mr. James that you hadn't heard from him in a while and that you didn't want to approach those people personally. You would just rather he would do it but that if he wasn't going to do it, that you would approach them personally about buying that stock?

A. Mr. Ball's stock, yes. That was some more of the stock that we didn't think was very friendly to us.

Q. Now this was in April, 1944, that you wrote this [fol. 1330] letter to Allen James? It was along in the spring of 1944 that you thought you had made a deal to sell the producing properties, wasn't it?

A. I can't remember the date, sir.

Q. When was it in 1944 that you first thought you had a deal that was eventually going to be consummated?

A. I can't tell you the date, sir.

Q. Was it before mid-summer?

A. I think it was in the summer, I believe it was.

Q. And you honestly and sincerely thought that you had made a deal, didn't you?

A. Yes, I thought we were going to make a deal.

Q. And going back just a moment, you had been before your own stockholders in the spring of 1944 and discussed with them that you would go out and try and sell the producing properties, didn't you?

A. I tried to sell all the time, sir. There never was a time we weren't trying to sell it. I can't deny that. We were certainly trying to sell it. Everybody wanted money and we were trying to sell it. We couldn't sell it.

Q. And you endeavored immediately, following the stockholders' meeting in the spring of 1944, to do as you had promised and go out and try and sell the producing properties, didn't you?

A. Yes, I think I did.

Q. Who all did you contact to try and sell the producing properties?

A. I went over that with you once and I can't remember all of them but I think I can think of another one—there was pretty near everybody I knew in the oil business.

Q. I don't believe you have told me but I will help you the best I can. I remember you told Mr. Siefkin I think it was the Standard Oil, the Cities Service, the Bradley group, the Sohio. Who were some of the others, Co-op?

A. Co-op, the Central Pipeline Company of Illinois, The Sun-Ray—I forgot the Sun-Ray—they were trying to buy it. There were quite a number of them.

Q. Who was the first of one of those that you felt that you were about to make a deal with or had made a deal?

A. I think the only one that we ever thought we were close to making any deal with was with the Co-op.

Q. That was the Co-op?

A. I believe so.

Q. And was that along about May of 1944?

A. I can't tell you the date.

[fol. 1331] Q. All right. Is there any record that you could refer to about any loan agreement or leases transferred or stock purchases that would help to refresh your recollection, sir?

A. Sir, I don't have any records at all.

Q. Well, what was the deal that you thought you had made with Co-op. Maybe we can get at it that way.

A. It is pretty hard to tell you. I can't tell you exactly what it was. In fact, I can't even tell you close to what it was now. It didn't go through and there was never any letters on it or anything. I can't tell you the amounts, I couldn't possibly tell you.

Q. Well, the deal with Co-op was to sell the producing properties or the oil from the producing properties, was it not, sir?

A. No. I think the deal with the Co-op, sir, was to sell the properties that there was no call on the oil only at that time, I believe.

Q. But you did not think that you had a deal with Co-op, didn't you?

A. Yes. We couldn't have made it any way on account of the liquidation of the other properties, the assets, I don't believe.

Q. I am asking you if at one time in 1944 you didn't think that you had a deal with the Co-op?

A. I think I have told you fifty times that I did, yes.

Q. That is all that I want to know. Now, following the fact that you thought you had a deal with Co-op, did you get in touch with Mr. Ives and inform him of that fact?

A. I think I did.

Q. Yes, sir. And what did you tell Mr. Ives?

A. I told him I thought we were going to make a deal.

Q. All right. What else did you tell him?

A. I don't know what else I told him. I don't think there was anything else to tell him, was there?

Q. Did you tell Mr. Ives that you would have in half of the stock to show good faith?

A. No, sir.

Q. Did you tell Mr. Ives that you had some investment bankers that would pay you $2.50 a share and to try and get in about 25,000 shares?

A. No.

Q. Did you tell him anything to start him out acquiring this stock in Aledo in 1944?

A. Well, sir, we just had a meeting in Aledo when they authorized me to go sell the producing properties for [fol. 1332] $8.00, get them $8.00 a share, didn't they?

Q. And did you think that you had made a sale of those producing properties in 1944?

A. I think I did.

Q. All right. And you so communicated that to Ives and started this matter rolling then, is that right?

A. I would naturally talk to him. He was attorney for the company, sir, and I would have to talk to him and he was secretary and treasurer of the company, yes. I would say, yes, I told him that.

Q. All right. Now, let's go a little further. On May 8, 1944, I will ask you if Arthur Kincade didn't write you a letter, Plaintiff's Exhibit Number 103, in which he stated:

"Dear Bill: I returned last night and have glanced over the run statement which you enclosed. It is indeed very interesting—$68,000.00 is, in fact, very substantial income for any young company.

"George Heiser has been around the bank today, and left a confidential report with me on the young fellow from New York, who he feels would be interested in joining your

project. This fellow has about four million dollars cash, and is looking for your type of deal. He and Richard Gill are supposed to telephone this afternoon and ask permission to come up here to meet you and me, and discuss the whole matter. At the moment I think I should tell them to wait until they hear from me further.

" • • •

"With best wishes, I am

"Sincerely,

"ARTHUR."

Now the young man that had the four million in cash, was this man Roos, wasn't it?

A. That would have to be somebody else. He is not a young man, sir.

Q. Well, I wish you would examine the letter and tell me, if you know, who Kincade was referring to as the party that was coming in?

A. I know who Richard Gill is but when he says a young man in New York he must have been talking about somebody else besides Roos because he is quite an old man.

[fol. 1333] Q. He is?

A. Yes, sir.

Q. Very well. Now, I notice that Mr. Kincade says that this young fellow from New York, he felt, would be interested in joining your project?

A. Yes.

Q. Now your project was to get and eliminate a lot of these smaller shareholders, wasn't it? That was, in truth, your project at that time?

A. Well, my project was to develop properties and if anybody was interested enough to put in that much money they would be pretty substantial associates, wouldn't they?

Q. What I am getting at, you, as President of a company that had this stock outstanding, what difference would it make to you whether the stock was in the hands of Mr. "X" or Mr. "A"?

A. I will tell you, sir, it made no difference to the Aledo group. They were all very fine people and I was very happy to have every one of them stay in it. I never asked one of them to sell a share of stock, sir.

Q. And I will continue with some letters. Perhaps I should wait to ask the question but I will ask it now and then we will develop the matter. Why were you so anxious, starting in the fall of 1943, and continuing right on to keep working and changing and manipulating this stock?

A. Where do you say that I kept working and changing and manipulating the stock?

Q. I will come to that in a moment.

A. I wish you would.

Q. Very well.

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Q. Mr. Black, in connection with purchasing this stock of the Aledo group in 1944 you had to use a considerable amount of company funds in it, didn't you?

A. I think so, yes.

Q. As a matter of fact, on one of the amounts of money that you sent to Dale Ives you were $65,000.00 short here in the Fourth National Bank and Leon Huff sent down $65,-
[fol. 1334] 000.00 of company funds to cover that, didn't he?

A. I believe that I have seen that in the record.

Q. Yes, sir. Now, I call your attention to a letter that you wrote to Mr. A. J. Peters, Executive Vice-President of the First National Bank and Trust Company of Oklahoma City, Oklahoma, on September 23, 1944. It is Plaintiff's Exhibit Number 93. First of all in one paragraph you say:

"We have drilled-in a number of successful wells since I last saw you but so far have been able to get along without any additional financing. We are, however, running into some expensive drilling in the western part of the state where we are now completing a deep test."

Where was it that Black-Marshall drilled a deep test in Western Kansas?

A. I believe it was in Rooks County.

Q. What was the outcome of that test?

A. We drilled the Maune lease that was deep. I believe we got two out of three wells on that, two producers out of the three wells.

Q. All right, continuing in this letter from you to Mr. Peters, Vice-President of this bank, September 23, 1944, and I call your attention to another paragraph:

"There has recently been quite a lot of activity in the trading of our stock. Some very wealthy and influential persons have been buying out some of our smaller stockholders. I will give you the full information on this when I see you.

" • • •

"Yours very truly,

"W. H. Black."

Now, who were the wealthy and influential persons that were buying out these smaller shareholders?

A. Well, according to the date, I presume it was Mr. Gill and Mr. Roos. I would certainly think that would be good relationship with your bank, to know that some important people thought enough of your stock to buy it.

Q. That is, you thought it would look well to Mr. Peters, the banker, to let him know that the smaller stockholders were being eliminated and you were getting influential [fol. 1335] people?

A. No, that we had important people who were interested in going into our company. I would say that would be very fine relations. I don't know how you could beat that to make your bank think that your company had value that they were loaning money on. I would think that that would be valuable.

Q. What happened to the little stockholders?

A. What happened to him? He sold his stock, because somebody else wanted to buy it. If somebody wanted to buy it and somebody wanted to sell it I certainly can't see anything wrong with that.

Q. You couldn't see anything wrong with eliminating the small stockholders?

A. The small stockholders, what I meant was that those people who were interested in putting in large amounts of the money so it must have some substantial value behind it, if they were interested in putting in large sums of money.

Q. All right. Now I call your attention to a letter from Richard Gill to yourself and Mr. Arthur W. Kincade, dated November 1, 1944.

"I wrote Bill Black a day or so ago reminding him that you all had promised to come hunting with me on the Thanksgiving week-end."

and then a matter of a personal nature there and then he says:

"This hunting should afford you"——

he is writing to Kincade now,——

"and Bill and an excellent opportunity to do some honest to goodness thinking of the Black-Marshall matter and what steps should be taken about getting the right kind of people interested with us to eventually get the stock in the hands of a very few. I have some definite ideas and will discuss them with you then.

"Sincerely, your friend,

"DICK."

You did receive that letter from Mr. Dick Gill?

A. Yes, I think I did.

[fol. 1336] Q. And what were these plans that he had of eventually getting the stock in the hands of a very few?

A. I don't know what his plans were, sir.

Q. Well, he said that he had some very definite ideas and was going to discuss them with you?

A. We didn't go down so I didn't discuss them. I have no idea.

Q. You have no idea. You did see Mr. Gill after and subsequent to November 1, 1944, didn't you?

A. I think I saw him about the middle of 1945 in Santa Fe, New Mexico.

Q. I see. As a matter of fact, didn't you and he go together on a lease deal down in New Mexico?

A. That is when I saw him.

Q. I see. And did you at that time discuss how to get this stock in the hands of a very few?

A. No. We were trying to get some leases in New Mexico.

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[fol. 1339]

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Q. Very well. Now this letter that you sent to Arthur Kincade, that you had written to Roos and Gill, I just want to refer to one paragraph. It is dated December 8, 1944, to Richard Gill and also similar letter to Edward Roos and in that you tell them as follows:

"Our annual stockholders meeting was held here in Great Bend on the 6th day of December, 1944,

I assume

"as scheduled. Almost one hundred percent of the stock was represented by owners or proxies. Everything went as we hoped it would.

"The principal business was the acquiring of the stock interest of Mr. Marshall. You can believe me when I say the final consummation was a relief to me as I have had many hours of anxiety and have exercised every effort and influence to effect this successful conclusion. I wouldn't attempt to burden you with the many details involved preliminary to this transaction, however, it was worth it and we should all be very happy and too, I believe we made a remarkable deal."

And thereafter you set out you are buying some of the shares at, I believe, $10.00, and then some at $11.00 and the balance of the stock at $12.50.

You remember those letters, do you not?

A. Yes, sir, I think I do.

Q. How do you reconcile the statement to Richard Gill and Roos that you made a remarkable deal in getting Mr. Marshall's stock lined up at ten, eleven and $12.50, and you were at the same time taking this stock from Aledo at [fol. 1340] $10.00?

A. I had two or three years to pay for it so if the company, going the way it was going then, would certainly be worth more than $12.50, wouldn't it?

Q. I see. And at the very same time you knew that Gill and Roos were perfectly willing to pay $12.50, didn't you?

A. Yes, they could have bought that stock if they wanted it, sir.

Q. Now do you understand what I meant by the word "manipulation," some of your stockholders you were giving a ten dollar break, some of them eleven or twelve fifty, investment brokers, at twelve fifty. That is what I mean by that manipulation.

A. You may call it manipulation but I don't think it was.

Q. Very well. I call your attention now to a letter from Arthur Kincade to yourself on March 24, 1945. It is Plaintiff's Exhibit Number 106.

"Dear Bill:

"Andy Peters has put me squarely on the spot—"

Now, who was Andy Peters?

A. He was the vice-president of the First National Bank in Oklahoma City.

Q. "Andy Peters has put me squarely on the spot with reference to the loan you discussed with them, saying, 'In fact, I rely so much on your opinion regarding this loan that I hope I am not becoming tiresome to you.' He says that you have applied for a loan of $1,250,000.00—"

Now, had you applied for such a loan on or about March 24, 1945?

A. I presume I did, I can't remember.

Q. All right.

"—to take care of all of your indebtedness as of June 1 this year, with provisions for an additional $400,000.00 for drilling of wells to be used at the rate of $20,000.00 per well, or a total commitment of $1,650,000.00 and at a rate of three percent. He says that Cal Moore is to be in Great Bend on Monday morning to start appraising the properties."

May I pause there? Who was Cal Moore?

A. Engineer.

Q. For who?

A. For the bank.

Q. He made many appraisals of oil field properties, didn't he?

A. I presume he did. He made some for us, are the only ones I saw.

[fol. 1341] Q. You had him make some for Black-Marshall?

A. Yes, sir.

Q. All right. "Naturally I will tell Andy and Otis that I think the program is all right, and as you stated yesterday it should be completed probably by the first of October.

"By all means Bill, I think you should begin now definite plans for the sale of enough of the company's producing properties to pay it entirely out of debt * * * "

Do you remember getting that word from Kincade?

A. Yes, I got that from everybody.

Q. You did? So you had not only discussed with the Aledo people in the spring of 1944 about the advantage of selling producing properties but were advised by Mr. Kincade in the spring of 1945 to the same effect, weren't you?

A. I had no control over his advice, sir. I couldn't keep him from telling me that. Everybody tried to get me to do it.

Q. Mr. Kincade was your banker, in part, was he not?

A. Yes.

Q. He was your friend?

A. You don't always take advice of your bankers.

Q. He was your partner?

A. Yes.

Q. Well, this is the same advice that you had given the Aledo people?

A. They wanted to sell and get some money and that was the only way I could ever think to get them any money.

Q. Was to sell the producing properties?

A. Or either sell their stock.

Q. All right. Continuing, he says:

"You should begin now definite plans for the sale of enough of the company's producing properties to pay it entirely out of debt and make partial liquidation to the stockholders. To my mind this is the smartest move you can make, and is unquestionably good business for the company and for yourself personally. You and I are not yet fifty years of age and we should have our best years ahead of us. The proceeds of this sale would put us in position to do business on a different basis in the future and should make living a real pleasure in every respect. The present ma-

jority stockholders of the company shculd then be anxious [fol. 1342] to go along on any new venture and, of course, you would be in position to select such of them as you would wish to be associated with you."

Now, Mr. Kincade——

A. I don't get the continuity of that letter, sir.

Q. I beg your pardon?

A. I say, I don't get the continuity of that letter. I don't know what he means by being able to select those that you wish to go along with you if we are just selling properties and paying it out to the stockholders. I don't know what he means by that. I can't interpret that.

Q. Very well. And let's see, he says a little further:

"With this plan in view I would say that the refinancing be done on such terms as would permit prepayment in event of such sale."

Now you understand what he means by that, don't you?

A. Prepayment to the bank, yes.

Q. In other words, he is telling you that——

A. If we borrow this money have it to pay it off.

Q. And have it in shape so if you sold the producing properties you could repay the loan?

A. Yes, I can understand that.

Q. That is plain enough?

A. Yes.

Q. Continuing: "You will probably want to give some thought in advance of such sale of eliminating the greater part of a large family of stockholders."

A. Yes, sir.

Q. Well, you and Mr. Kincade were pretty close, weren't you?

A. I thought we were, yes.

Q. You discussed these matters about Black-Marshall?

A. Is that my suggestion or his?

Q. That is his suggestion.

A. Yes.

Q. My question now is, did you discuss with Mr. Kincade this matter of eliminating the greater part of your large family of shareholders?

A. I might have, I don't recall it. I don't believe I did. I don't know of anything that would tie up my conversation, that would tie my conversation in with him that I did.

Q. You won't say that you did not?

A. I won't say that I did not. I don't believe that I did.

Q. Then he said, with reference to these matters—the paragraph I am reading from comes in the middle of the [fol. 1343] letter—"I am writing you about this now because we do not have frequent opportunity to discuss company affairs, and we are generally too pressed for time on your visits to talk such things out thoroughly."

You understood the reason Mr. Kincade sent you the letter marked "personal and confidential" was to get you to thinking about this program of eliminating those smaller stockholders, didn't you?

A. He says here that he has been giving it a lot of thought and he has a fixed opinion on that decision and would write to me later about it but I don't think he ever did.

Q. You say Mr. Kincade, I think you told Mr. Siefkin, very frequently——

A. Yes, sir, I did.

Q. —he would come to Great Bend, I think you said.

A. Yes, he was there many times.

Q. And you came to Wichita?

A. Not too frequently.

Q. You visited in his home, didn't you; you let him use the company airplane, didn't you?

A. I am trying to get my dates whether I visited in his home—this was 1944? I might have.

Q. You made the company airplane and the pilot of Black-Marshall available to him over the country whenever he wanted to go, didn't you?

A. I sure did. He was very helpful to me.

Q. Yes, sir. And you did discuss with Arthur Kincade the plan of eliminating the large family of stockholders, didn't you?

A. I can't say that I did, sir. I don't know that I—I won't say that I didn't but I have no recollection of it, and there is nothing in that letter to indicate that I did.

Q. Now then, I call your attention to a letter in 1945, in August, that you wrote to Allen James.

"Dear Allen: I tried to call you on the 'phone today—" This is Plaintiff's Exhibit Number 25. "I tried to call you on the 'phone today only to find you were out of town. I am anxious to know if it is possible to buy the stock held by Mr. Ball or any of the other stockholders we acquired through your group.

"I am working on a deal to sell the company or rather the stock of the company and have all the other shareholders lined up."

[fol. 1344] Now, let's pause there a moment. You are writing here to Allen James on August 16th, 1945, that you are working on a deal to sell the company. Who were you working on a deal with?

A. Co-op.

Q. And you say: "I have all the other shareholders lined up."

A. That is right.

Q. Was that right?

A. Yes, lined up, sure. I didn't say I had them lined up to buy their stock.

Q. How did you have these shareholders lined up?

A. They were all agreeable for us to make a sale.

Q. How did you know that you had the shareholders in Aledo lined up?

A. Mr. Ives told me that they would be glad to go along on it.

Q. And had he told you that he could get all of them to come in?

A. Well, I would say the majority of them.

Q. Well to be frank about it, you knew that you had relieved those Aledo people of one-half of their stock in 1944, didn't you?

A. That is right.

Q. And you knew that they had given up that stock on the theory and the promise and the belief that a sale was under way of the producing properties, you knew that, didn't you?

A. Yes, sir, we always tried to sell it, sir, and we always thought, time after time we thought we were going to.

Q. I know, but let's hurry along. You knew that that was the motive by which they had given up half of their stock?

A. I did not, sir.

Q. You did not?

A. Not the first half, no.

Q. And you are willing to swear under oath that you never knew as late as August, 1945, how and in what manner had caused all those people to part with half of their stock?

A. I found that out sometime I believe in the latter part of 1945 but I don't think it was that early.

Q. All right. But in any event you did tell Allen James that you had all the other stockholders lined up as of August 16th, 1945, didn't you?

A. I believe I did, yes.

Q. And the only way you could have the Aledo people lined up was through Dale Ives?

A. That is right.

Q. Is that right?

A. That is right.

Q. Now let's go to the next letter, on August 24, 1945. On that date you received from Bonicamp and Koelling and Fox, Morgan and Rossdutcher, but I will not take time to [fol. 1345] read it in its entirety to the Court, but in this Exhibit they wrote to Mr. Black and to Mr. Kincade, did they not, and outlined to you two gentlemen how to go about selling the producing oil leases to a company that wants to acquire them and have the least tax liability. That was the gist of that letter, wasn't it?

A. I don't remember the letter. I would have to read it.

Q. Take a glance at it. I don't want to be unfair to you.

A. I certainly should have a chance to see it.

Q. But I was just trying to hasten along.

(Colloquy here is had off the record.)

A. Sir, there are so many figures in here I can't quite——

Q. Well, let's see if we can't sum it up. Let's be frank with each other.

A. All right.

Q. You got a letter from two accounting firms, Bonicamp and Koelling, Fox, Morgan and Rossdutcher. One was signed by John Bonicamp and one by Mr. Fox, right?

A. That is right.

Q. And that letter was addressed to W. H. Black and A. W. Kincade and dated August 24, 1945?

A. That is right.

Q. Without burdening the Court with all the letter, let's see about this part:

"We have given further consideration to the preliminary plan heretofore considered relative to a change in ownership of a certain amount of the now outsfanding capital stock of the Black-Marshall Oil Company and a partial liquidation of the corporation.

"You have informed us that the present outstanding capital stock of the corporation is represented by 173,000 shares, no par value, divided about as follows:

Black and Kincade	74,000
Deering Marshall	30,000
Others	69,000
Total	173,000

"You have further provided the information that an estimate of the fair value of the total outstanding stock is $2,595,000.00, or $15.00 per share, and that a certain prospective purchaser is desirous of acquiring certain of the [fol. 1346] producing oil leases now owned by Black-Marshall Oil Company, which properties have an estimated market value of approximately $3,155,000.00. These properties together with other properties of the corporation, are subject to a mortgage in the amount of $1,600,000.00," and so forth.

That is Plaintiff's Exhibit Number 278. Now, I want to read a little more. And they discuss with you how you can go about working out this sale and a partial liquidation and then they say: "As will be noted, the above plan will leave the corporation possessed with all properties except the specified producing oil leases."

Now, the plan that you had put up to Bonicamp and Koelling and Fox, Morgan and Rossdutcher was some plan whereby you could sell the producing properties and retain all other properties except producing oil leases. That was the plan that you had ask advice on, wasn't it?

A. It seems to be, yes.

Q. Yes, sir.

A. I would have to have more of the letter to understand it, though.

Q. Well, all I know is that these gentlemen——

A. That is just part of the letter. I would like to know more of the letter before I can answer that, sir.

Q. All right, let's take the time. Do you know who Bonicamp and Koelling was?

A. Yes, sir.

Q. Did you use them?

A. They were our auditors.

Q. Did you use them for your personal income tax work?

A. Yes.

Q. Did Mrs. Black use them?

A. Yes.

Q. Did Mr. Kincade use them?

A. I don't think so. He used Fox.

Q. He used Fox, did he?

A. I think so.

Q. Is that the reason you had two accounting firms sign this letter?

A. I am quite sure it is, sir. Mr. Fox never did any work for me.

Q. Now then, let's go back just a moment to this letter I read you a moment ago, personal and confidential, from Arthur Kincade to yourself, and bear in mind that his letter "personal and confidential" to you is dated March 24, 1945, where he says he thinks you ought to be giving some thought to selling the company's producing properties and eliminating the greater part of a large family of shareholders. That [fol. 1347] letter was on March 24, 1945. By August 24, 1945, two auditing firms report that you and Kincade have consulted them about the matter and they are giving you this report, isn't that correct?

A. They don't say we have consulted them, do they.

Q. Don't they say you have further provided the information?

A. An estimate of the fair value of the total outstanding stock.

Q. Mr. Black, you don't want to have the Court believe that two well-known auditing firms out of a clear blue sky wrote this detailed letter without you and Mr. Kincade consulting them, do you?

A. I'm not saying we hadn't.

Q. All right, and had you consulted them about the matters they discussed in that letter?

A. We have tried every kind of a deal, sir, every kind. I would say we discussed everything that is in there, sir.

Q. In that letter?

A. I would say so. They are very responsible people, yes, sir.

Q. And those are the same matters that Arthur Kincade wrote you on March 24?

A. Yes, he was trying very hard to promote that kind of a deal. I can't say that I was in favor of it.

Q. Now on August 29, 1945, I call your attention to Plaintiff's Exhibit Number 26, and you wrote Allen James as follows: "I have your wire regarding the Ball stock, and I have notified the bank to take care of the draft when it is presented." Now, let's pause there a moment.

A. All right.

Q. That is the Ball stock that you had been after for over a year, for Allen James to get for you, wasn't it?

A. Yes, sir.

Q. And you finally write him that you received his wire that he has got it and you have notified the bank to take care of the draft?

A. That is correct.

Q. That is right, isn't it?

A. Yes, sir.

Q. Now let's continue a little: "Mr. Kincade is in California and the deal has not been closed as yet, but I will see that the draft is paid in any event. As soon as you have any information on the Smith stock I wish you would let me know."

Now, let's pause there a moment. What Smith stock were you referring to?

A. That is the banker in Chicago.

[fol. 1348] Q. That is the one that——

A. That kept his stock.

Q. —that kept his stock and was in the final liquidation?

A. That is right.

Q. All right.

A. Incidentally, I went to see Mr. Smith and I talked with him myself about that time.

Q. All right.

A. I told him I was very happy to have him keep his stock.

Q. All right. "P.S. I will protect you for your commission of fifty cents per share when the transaction is closed." Now this Ball stock was purchased in 1945 with company funds, wasn't it?

A. I don't remember, sir.

Q. As a matter of fact, Mr. Black, wasn't all of the stock that was purchased in 1945 from the Aledo group and from this Mr. Ball paid for with company funds?

A. I don't think it was.

Q. Let me ask you again about the Ball. Will you say it was or was not paid for that way?

A. I won't say so, I don't know.

Q. We will find out about that then. Now let's go to your letter to Allen James of September of 1945.

"Dear Allen: The sale of the properties mentioned to you is off. We couldn't reach an agreement. So I have made arrangements for the company to retire the stock of any of the stockholders who wish to sell as some of them considered my negotiations for their stock as a commitment."

Now then, you had thought that you had a deal with the Co-op that was going to go through in 1945?

A. That is right.

Q. You had thought that you had a deal that was going to go through with the Co-op in 1944?

A. That is right.

Q. Both in 1944 and in 1945 the deal fell through with?

A. I so stated in that letter.

Q. That is right.

A. I couldn't have made it much plainer than that, could I?

Q. Now when the deal fell through with in 1945, you wrote to the James group, or to Allen James, that any of those people there that had put up stock for his sale that you would go ahead and carry out and retire it if they wanted you to?

A. That is right.

[fol. 1349] Q. Otherwise you would return their stock, wouldn't you?

A. That is what I meant.

Q. How come you didn't do that with the Aledo group?

A. The Aledo group never got any information like that from me at all.

Q. How do you know they didn't?

A. Well, Mr. Ives said they wanted to sell their stock.

Q. And that is your reason——

A. And this one particular stock that we are talking about was Mr. Ball's stock because that is the one that I finally got in and I was sure that he felt we had a sale made and I wanted him to know that we didn't have a sale made. He is the only one that I can think of that came in under those conditions.

Q. Well you understood that you occupied a fiduciary relationship, didn't you?

A. Yes, sir.

Q. You occupied a position of trust and responsibility and you owed a duty to the stockholders to keep them honestly and fairly and fully informed about these negotiations; you understood that, didn't you?

A. Yes.

Q. You understood that when people sent in their stock on your representation or the representation of the secretary and treasurer that the company was being sold that if the deal fell through with it was your duty to send their stock back or at least acquaint them with that fact, didn't you?

A. I thought they were acquainted with it, sir. I don't know why they shouldn't have been.

Q. Did you ever write to any of the people in this Aledo group who sent in their stock in 1944 and tell them in 1944 that the deal had fallen through?

A. No, but Mr. Ives should have told them that. He was their representative the same as mine. This man James was representing this Mr. Ball. I certainly wrote him and told him, did I not?

Q. I see. You were depending on Mr. Ives then to inform them whether a sale was made or not made, is that right?

A. I certainly thought that they knew that there wasn't a sale made. I don't know how they could keep from knowing it.

Colonel Walker: Will you read him the question?

(The question is read by the Reporter.)

A. Yes, sir.

[fol. 1350] Q. You were. Thank you. Now, let's go to a letter of September 26, 1945, written by yourself to Mr. Earl Hatcher. It is dated September 26, 1945, and marked as Plaintiff's Exhibit Number 114. I want to call your attention to a couple of paragraphs of that letter.

"Mr. Earl Hatcher: A copy of your letter of September 25 to Mr. Nolan has been handed to me, and it is definite proof of exactly what I anticipated and started to set out to you in a letter before receiving yours.

"We are becoming hopelessly involved with laymen's opinions and suggestions. It looks as though every man on the street is taking a crack at composing and this is just the beginning. Now, you and your people should realize that I left the drafting and the writing of this contract entirely up to you and your people. I was not represented by an attorney, not even to the extent of having my own associates approve."

Now, let's pause there a moment. Was that true that you were carrying on negotiations with the Co-op, not even letting your other directors—I suppose you mean by associates that, do you not?

A. I had had them in on so many deals, sir, I did not want to bother them until we got right down to the final deal. I had worn them out on deals.

Q. You just didn't even want to trust passing the information out to the other people?

A. I didn't want to bother them until we had something concrete.

Q. All right. Then you continue with your letter to Mr. Hatcher: "Now you are forcing me to call in my associates and to employ attorneys, et cetera, and you and I know the confusion that will cause."

Do I understand you to mean that you were running Black-Marshall practically as a self-owned company?

A. No, I wish you would let me read the rest of the letter.

Q. I will be very happy to.

A. I think this is very clear, sir.

Q. I beg your pardon?

A. I think this is very clear.

Q. Well, the inference that I would gain is that you were running Black-Marshall as though you individually owned it.

A. Sir, that was not——

[fol. 1351] Q. Permit me to finish.

A. Pardon me.

Q. And that you were not even calling in your associates and discussing with them matters of considerable magnitude because this refers to a $3,200,000.00 loan on the company?

A. That is correct.

Q. And in that loan you transferred to them all assets of the company, didn't you?

A. That is correct.

Q. And yet you didn't even want your own associates called in to consider or know anything about it?

A. That is not true.

Q. And yet you wrote Mr. Hatcher——

A. I told him I wanted to see his contract before I presented it to anybody. That is what I am asking for there. See what kind of contract he was going to submit to us. That is exactly what I say in that letter.

Q. Very well. We will leave that to the Court. Now, I want to read to you a letter from Dale Ives to yourself, dated October 14, 1945. Mr. W. H. Black, Great Bend, Kansas.

"Dear Bill:

"This is my acknowledgment of payment of $2,500.00 drawn on my order on the Black-Marshall Oil Company through the Fourth National Bank of Wichita. I forwarded to the Black-Marshall Oil Company on the 12th of October under separate cover the balance of the outstanding common stock held in this community except such stock as is held by Ira Roberts and all of the stock that was re-issued under a

prior sale all properly endorsed. You will note that this reissued stock was not dated due to the fact that under the circumstances I did not know what date you wished inserted but you can take care of that matter."

Now, let's pause there a moment. On October the 14th, 1945, Dale Ives sent to you some stock and told you that was the balance of the outstanding common stock in that community, didn't he?

A. It sounds like it.

Q. All right. And he further told you that he was leaving the dates blank in that stock in order that you could fill in the dates that would serve your purpose, didn't he?

A. Yes.

Q. And you did thereafter take that stock that Dale [fol. 1352] Ives sent in and you did thereafter put that in your lock box as street stock, didn't you?

A. I believe so.

Q. Now, you knew then, by October 14, 1945, or within a day or so thereafter, that Dale Ives had picked up all of the Aledo stock?

A. I think that was his own stock, sir. I think that part of it was his own.

Q. I beg your pardon?

A. I believe that part of it he is referring to in his letter was his own stock.

Q. Well let's see if we can't straighten that out.

A. Because all but Ira Roberts' stock—that is the shares he wound up with finally.

Q. Let's read this:

"I have forwarded to the Black-Marshall Oil Company on the 12th of October——"

that would be two days before this letter?

A. Yes.

Q. "—under separate cover the balance of the outstanding common stock held in this group."

A. That is right.

Q. With one exception. He says it was Ira Roberts.

A. Yes.

Q. This is Plaintiff's Exhibit Number 86. So you did know that October the 14th, or the 15th or the 16th, let us say, of 1945, that Dale Ives had picked up all of the com-

mon stock of the Black-Marshall Company in and around Aledo and forwarded it in?

A. That is right.

Q. Now then, within less than thirty days, you got a letter from Doctor Wadleigh and Doctor Wadleigh wrote to you and wanted to know something about this sale, who you had sold to, how much you had received for the producing properties, what the debts that had been paid were, and just a little information about it. You got such a letter from Doctor Wadleigh, didn't you?

A. I think I did, yes.

Q. And when you got that letter from Doctor Wadleigh then you got ahold of Dale Ives and asked him what sort of a reply to make to Wadleigh, didn't you?

A. I don't know that I did. I would have to see it.

Q. And Dale Ives wrote to you on November 10, 1945. It has been marked Plaintiff's Exhibit Number 12 here and let's see if this isn't the statement he made to you on or about November 10, 1945, in writing:

[fol. 1353] "Mr. W. H. Black, 1910 Broadway, Great Bend, Kansas.

"Dear Bill:

"I have not answered your letter before due to the fact that my entire family, including myself, have been down with the flu and there seems to be an epidemic over the whole state."

May I pause there just a moment and say that in going through your correspondence file I was unable to find that letter to Mr. Dale Ives.

A. Did you find it in his file?

Q. But this letter, Plaintiff's Exhibit Number 12, was one that Mr. Siefkin produced on your behalf sometime ago. But I want to know, do you have the letter that you wrote—that is a copy of it—to Mr. Dale Ives immediately prior to November 10th?

A. Sir, I have no letters.

Q. All right.

A. No correspondence of any kind.

Q. Continuing with the letter of Mr. Ives to yourself:

"Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing and that at the end of two years if any developing is done in the Landowners Royalty property we will have to put up the money, by we, I mean, the old stockholders of the original company.

"As I have heard nothing regarding the purchase of any property for our new small partnership I take it that you have not found anything that suits as yet. If you should find anything good buy it even though the costs are greater.

"There is money in the treasury of this new partnership so any time you need money either draw a draft on me or use your needs and I will forward check for the same. I wish to handle this matter any way you see fit, it being my idea to get one good well if possible soon and then ride along.

"With best personal regards,

"Dale."

[fol. 1354] Now you did receive that letter?

A. Yes, I received that letter.

Q. And you received it on or about the 10th of November, 1945, didn't you?

A. Yes, the latter part of the year.

Q. You received this letter within thirty days after Dale Ives told you that he had forwarded to Black-Marshall all of the outstanding common stock that was held there in and around Aledo. Now when you got this letter from Mr. Dale Ives you knew exactly what he had told those stockholders in order to get their stock, didn't you?

A. Yes.

Q. And did you do anything about notifying those stockholders that they had parted with their stock through fraudulent and untrue statements?

A. I don't think I did, sir.

Q. You did absolutely nothing to repudiate what Mr. Dale Ives had done in securing that stock from those people, did you?

A. I thought it was too late to do anything. I didn't know how I could.

Q. You thought it was too late to do anything and so you didn't do anything, did you?

A. I don't know what I could have done then.

Q. You never wrote a letter to a single stockholder, you never returned their stock or offered to return their stock, did you?

A. I couldn't return it.

Q. You had that stock of these Aledo people, a large part of it, at the time you received this letter, Plaintiff's Exhibit Number 12, in your lock box at Great Bend?

A. But it had been paid for, sir.

Q. You had thousands of shares of stock that you had secured from these Aledo people in 1944 and 1945 in your lock box at that time?

A. That is correct.

Q. All of the stock that you had secured from those people in Aledo in 1945 had been secured with company funds, every share of it, in 1945, company funds were used to get the Aledo stock, wasn't it?

A. I think so, I don't know, sir.

Q. And you had that stock in your lock box and you got this letter from the secretary and treasurer of your company that told you that that stock was tainted with fraud, didn't you?

A. It is my understanding they wanted to sell it, sir.

Q. I am asking you, sir, if after you received this letter, [fol. 1355] Plaintiff's Exhibit Number 12, you didn't know that that stock was tainted with fraud?

A. I think they all thought it was sold.

Q. The question, sir, is a very easy one. Will you read the question?

(The question is read by the Court Reporter.)

Mr. Siefkin: I object to it as an improper question and not a statement of fact.

The Court: Overruled. Read the question, Mr. Reporter.

(The question is read by the Court Reporter.)

A. I didn't think it was fraud, no.

Q. You didn't think it was fraud for Ives, either with your knowledge or without your knowledge, to tell people that all the assets were sold in order to get that stock sent in?

Mr. Siefkin: I object to that as a double question and improper.

Colonel Walker: I will break it down.

The Court: Sustained as to the form of the question.

Q. Ives recited in this letter what he had told all of those people, didn't he?

A. Yes.

Q. You knew that that statement of Ives was untrue, didn't you?

A. Yes, I didn't know what I could do about it at that time.

Q. Did it ever occur to you about returning that stock?

A. Well, I would certainly have liked to return it if I could.

Q. You did nothing to repudiate the deal but instead you ratified it and you used that stock either to sell to N.C.R.A. or retire it for your own advantage?

Mr. Siefkin: I object to that as repetition and an improper question and a double question.

The Court: It is a double question.

Q. All right, I will break it down. You did ratify what Mr. Ives told those people?

[fol. 1356] Mr. Siefkin: I object to that as calling for a conclusion and a conclusion of law.

The Court: Sustained.

Q. You did take the stock in your lock box and thereafter sell some of it to N.C.R.A., to-wit, 11,714 shares, didn't you?

Mr. Siefkin: I object to that as repetition.

The Court: Overruled.

A. Two years later, sir.

Q. And in that two year period you still knew that Mr. Ives had written you here on November 10, 1945, didn't you?

Mr. Siefkin: Just a minute. I object to that as repetition.

The Court: I think it is repetition.

Colonel Walker: Very well.

Q. Mr. Black, I have talked to you some at length I believe yesterday and I know this morning about your alleged statement that you sold oil leases up in Illinois on certain properties in 1939 to get several thousand dollars which you said you took to or sent to a bank in Oklahoma, and used in connection with the Esfeld lease. You recall discussing that, don't you?

A. Yes, I do.

Q. Do you recall that I asked you once, at least, and perhaps more than once, if it wasn't a fact that you hadn't sold any of those leases until 1940? Do you remember that?

A. Yes, but I don't think that is right sir.

Q. And you denied that it was 1940, didn't you?

A. Yes. I sold some in 1939, I am sure.

Q. Mr. Black, I can't tell you any more than since I have examined you this morning, we have telephoned to the register of deeds and it may be that our information is not correct.

A. Yes, sir.

Q. I want to give you an opportunity to be thinking about this matter. I am going to ask you, sir, if this isn't true: That if on February 3, 1940, W. H. Black and Ruth Black did not assign a lease to the Kingwood Oil Company?

A. Yes.

[fol. 1357] Q. Now that was in February of 1940?

A. That is right.

Q. That would be long after the Petroleum Investment Company had not only started but after they had gone out of business, wouldn't it?

A. That is right.

Q. And I ask you, sir, if it wasn't on November 9th, 1940, that W. H. Black assigned some of the leases in that area you mentioned to Harry Mellor?

A. On what date?

Q. November 9, 1940, that you made an assignment to Harry Mellor, M-e-l-l-o-r?

A. I believe that was 1939, sir.

Q. You still want to insist that it was 1939 now?

A. No, I am not insisting. I believe it was.

Q. All right, let's go to another one. I will ask you, sir, if it wasn't on October 4, 1940, that W. H. Black made another assignment to Harry Mellor, a part of this acreage that you mentioned?

A. Yes.

Q. You say it was or was not 1940 now?

A. I think that was 1940 you are talking about, yes.

Q. Well, how about the one to the Kingwood Oil Company. Do you want to say now it was 1940 instead of 1939?

A. I do not.

Q. You still want to insist that that was 1939?

A. I do not.

Q. Well, will you admit that it was 1940?

A. The deal you are talking about I certainly do, yes.

Q. All right, and how about the deal to Harry Mellor, now that we have refreshed your recollection?

A. That is not the leases I am talking about, sir. I had no leases in my name in White County in 1939. The leases were carried in the Damon Corporation's name and were sold by them and Mr. Garland and myself divided the money, sir. They were not sold by me personally in my name. They were never in my name until the latter part of 1939 or the early part of 1940.

Q. I will ask you, sir, if it wasn't on October 16, 1940, that you made another assignment to Harry Mellor?

A. I made several, I don't know the dates, sir.

Q. And they were all in the fall of 1940. Do you remember making a number of assignments, perhaps a half dozen, in October of 1940 to a party by the name of Harry Mellor?

A. I do.

Q. Who was Harry Mellor?

A. He was representing the Sinclair Oil Company, I think.

[fol. 1358] Q. Mr. Black, we were unable to find that there was any assignment made such as you described in 1939 and we have these dates and these assignments.

A. Would you check upon the Damon Corporation and see if they sold them?

Q. We will be very happy to.

Mr. Siefkin: I can help you, Colonel Walker. I have got the recording books and page sir.

Q. All right, it is very much appreciated. Now, let's go to another matter. In 1945, Mr. Ives said that he sent in to you the last of the stock around Aledo. That letter was dated October 14, 1945. What were those people receiving for their stock in October of 1945 out in Aledo?

A. Well, that stock had been bought quite a long time before that, sir. It was that late getting in I believe.

Q. Well, you were using company funds to acquire it and you know that it was $12.00 a share, don't you?

A. I think that is right.

Q. At the very same time, just three days difference, and on October 17th of 1945, you were paying to Arthur Kincade $17.50 a share for Black-Marshall common stock, weren't you?

A. I believe that is right.

Q. What explanation can you give of using company funds to pay a man that you were in partnership with $17.50 a share and at the very same and identical time paying $12.00 a share to the stockholders at Aledo?

A. I don't know whether we had any new wells in the interim come in or not. I can't answer that, sir. It was just a question of getting it in at the best price we could get it in if the people wanted to sell it.

Q. You didn't have any wells come in of any consequence between October 14, 1945, and October 17, 1945, did you?

A. I don't know. There might have been a raise in price of oil or something. I can't answer that.

Q. All right, let's eliminate that once and for all, if it is possible, and here is the schedule of wells drilled. Tell us, if you will, if any wells came in in that interim and I think we have the price of oil here somewhere.

A. I don't believe—this is for the loans, I don't think it has anything to do with the wells.

Q. All right, let's first take up the price of oil. Your attorneys have introduced the affidavit of T. A. Morgan. [fol. 1359] He is the director of the Conservation Division of the Kansas State Corporation Commission, isn't he?

A. Yes.

Q. His statement is that the price of oil in 1941 was $1.25 a barrel, that in April, April 1, 1946, it jumped from

$1.25 to $1.35. Therefore, the price of oil remained at $1.25 from May 19, 1941 to April 1, 1946, did it not?

A. That is right.

Q. So there was no change in the price of oil. Now, let's look at this analysis of wells drilled as prepared by your attorneys and let us know whether you had any wells come in in that interim period.

A. I can't see anything in here that would materially affect it.

Q. From an examination of the schedule of wells which gives the date each one of them came in, its initial production, that has been prepared by your attorneys or someone at their request, are you able to find there had been any material change of any new wells or increased production between October 14, 1945 and October 17, 1945?

A. No, I don't think so.

Q. You are unable to find it, aren't you?

A. I can't find it.

* * * * * * *

Q. Mr. Black, I understood you to say that in 1944 you thought you had a deal made for the sale of the producing properties?

A. 1944, I believe so.

Q. And will you just explain the nature of the deal that you thought you had ready to consummate?

A. That is pretty hard for me to explain, sir. We had several deals we were working on at that time and I don't know that I could explain that right now, sir. I haven't thought very much about it.

Q. Who did you have your deal with, what company?

A. Well, we had quite a few. We had this company from Texas, the Texas Gulf Company and they were out and I [fol. 1360] thought that they were very likely prospects. They seemed very much interested up until the price, until we came up to a price. That is one company that I am sure of. And I think we also had the Sohio. We had Mr. Swensrodd and Mr. Wallace, with their engineers out here, and I believe they were the most likely prospects at that time.

Q. Now you did communicate with Mr. Ives in 1944 that you thought you had a sale?

A. I expect I did.

Q. Who did you think you had a sale with, what was the terms of the sale that you thought you had?

A. I don't remember the terms now, sir.

Q. And when you communicated with Mr. Ives that you thought you had a sale was that a sale to Co-op?

A. In 1944 it could have been. We tried quite a few of them in 1944.

Q. And was that a deal with Co-op that you had been negotiating with Mr. Hatcher?

A. If it was with Co-op it was with Mr. Hatcher, yes.

Q. And do you know of any other deal that you were negotiating with Co-op through Hatcher in 1944 other than what Hatcher relates in this letter of his to the Directors under date of May 8, 1944?

A. Well, I don't remember what he had in his letter, sir.

Q. Well, in Mr. Hatcher's letter of May 8, he said he had an arrangement with you whereby Co-op was buying the producing properties and you were to get in fifty-one percent of the stock, and then ten days later Mr. Hatcher wrote his directors that the deal that he had referred to in his former letter had fallen through.

Now, what I am trying to find out is what kind of a deal did you think you had made when you notified Ives that there was a sale?

A. Well, there has been so many of them it would be almost impossible for me to be correct on it, sir. I would hate to tell you if I couldn't tell you correctly and I don't remember.

Q. Is it possible that when you notified Ives you thought you had a sale, it was following this agreement that Mr. Hatcher speaks of?

A. I don't remember that arrangement, sir. I don't recall, and I can't see why we would be selling it with fifty-one percent of the stock unless we were selling fifty-one percent of the stock.

[fol. 1361] Q. Let's see if we can get at it this way: Was your deal in 1944 to sell all of Black-Marshall or just sell the producing properties?

A. I think at that time it was to sell all the producing properties.

Q. All of the producing properties. And under that arrangement you would have retained the undeveloped acreage and Landowners, wouldn't you?

A. I think that is correct, sir.

Q. Now, let's come along to 1945.

A. Yes.

Q. Again in 1945 you notified Mr. Ives that you were quite certain you had a sale this time?

A. Yes, sir.

Q. Now then, with whom did you think you had the sale in 1945?

A. That was with Co-op, sir.

Q. And who had you been negotiating with that represented Co-op?

A. Mr. Mary, and Mr. Hatcher and the Directors of Co-op.

Q. Now what was the nature of the deal that you thought you had made with Co-op in 1945, at the time you notified Ives?

A. In 1945, sir, we were selling everything that we had with the exception, I believe, of the Landowners Oil Association.

Q. And how were you to consummate that transaction, by the sale of stock, or just the sale of assets?

A. That was discussed both ways, sir, and I am not sure whether we ever decided, when we got to the sale we would have to take it up with our tax people and let them tell us how to make it. We didn't know.

Q. So at the time you notified Mr. Ives you did feel then that you might need some stock to consummate that deal, didn't you?

A. With who?

Q. At the time you notified Mr. Ives in 1945?

A. Yes.

Q. That you thought you had a sale made, you did feel that you might need some stock?

A. Why would we need the stock?

Q. I am asking you.

A. I don't think so. I don't think we would need any stock. I don't see where we would.

Q. So neither of your deals of 1944, so far as you recall,

or your deal in 1945, was going to actually require the transfer of any stock?

A. If we were going to sell the stock we would have to transfer the stock, yes, sir.

Q. Well, which way was it?

A. It was both ways. We were talking both ways.

[fol. 1362] Q. So if you were talking both ways then do I assume that you felt you might need to get in this Aledo stock to bind the deal?

A. No, sir.

Q. And I take it that you state to the Court here you didn't need any stock?

A. No, I don't think we did. We had more than enough stock to consummate the deal.

Q. So if I understand you correctly then there was no necessity for Mr. Ives ever telling the Aledo people it was necessary to send in stock?

A. There was absolutely no necessity for him telling them that, sir.

Q. You never instructed Mr. Ives to tell those people to send in their stock in order to bind the deal, did you?

A. I never did, sir.

Q. If you had of known that Mr. Ives was telling the people that in order to obtain their stock would you have accepted that stock when it did come in?

A. Will you ask that question again?

Q. If you had of known that Mr. Ives was telling these people in Aledo that it was necessary for them to send in their stock to bind the deal, would you have accepted that stock when it came in under those circumstances?

A. I don't know that I would or wouldn't. I am not an attorney. I wouldn't know, sir. He was our attorney and he was the one that tried to handle the legal matters of the company. Whether that was a legal matter or not, I mean it would have to be a legal matter and I wouldn't know, sir.

Q. I am approaching it from a matter of morality. If you knew that Mr. Ives was getting stock from those people in Aledo by telling them a lie would you have accepted and used that stock?

A. No, sir, I would have not.

Q. You wouldn't have tolerated that, would you?

A. I certainly would not.

Q. Now as soon as you did find out that Mr. Ives had made false statements to those people in the fall of 1945, you still did nothing about the matter, did you?

A. I don't know what I could have possibly done then, sir.

Q. My question is: Did you do anything?

A. I did not.

Q. Now with respect to this Ives getting this stock, do you recall that in 1944 you sent the Black-Marshall airplane out to Aledo to pick up a portion of that stock Mr. Ives was [fol. 1363] gathering together?

A. I don't know whether we sent the plane for the stock or for Mr. Ives.

Q. Well if you sent the plane out there, isn't it a fact that it returned with the stock whether Mr. Ives was with it or not?

A. Could have, sir. I don't remember that. We sent the plane several times for him and I just don't remember, sir.

Q. And did he bring stock in several times in 1944?

A. I don't think he did in the plane.

Q. Just tell us, if you will, how Mr. Ives delivered the stock to you, whether in person or by plane or through the mail or not?

A. I think most of it was sent to us in the mails. I am pretty sure it was. I can't say for sure. It was a long time ago, sir, and I believe it was mailed to us.

Q. And then when it came in the mail——

A. The drafts were drawn on some of it.

Q. When that stock came through the mail and reached your hands, what did you do with it?

A. What did we do with the stock?

Q. What did you do with it, yes, sir?

A. Well, we paid for the stock and put it in the lock box.

Q. And the 1944 stock you used some company funds to pay for it with?

A. I think we did.

Q. Yes. And then we have gone over it, part of it you sold to Roos and Gill?

A. That is right.

Q. And made the profit we have already been over. How many times did you communicate with Mr. Ives about getting this stock in?

A. I can't answer that, sir.

Q. Don't you recall that you talked with him frequently about getting this stock in?

A. Yes, we talked about it many times. He was always trying to get me to find a market for the stock.

Q. And you were always trying to find a market, weren't you?

A. Quite often, yes.

Q. And, as a matter of fact, you did find a market for all of that Aledo stock, didn't you?

A. Well, we either found a market or bought it.

Q. And the market you found for all of the 1945 stock was Mr. W. H. Black?

A. All of the 1945 stock?

Q. Yes, sir.

A. Oh, I don't think so.

Q. You took all of that stock, you put it in your lock box, [fol. 1364] it lay there during 1945 and 1946 and until 1947, when you retired part and used the rest for your own use and benefit, isn't that right?

A. I don't think—I don't know why if I bought it for myself, I don't know why I didn't keep it all, sir. I didn't keep it all.

Q. Do you recall that when Mr. Siefkin was examining you on direct examination that you said there was certainly no reason why you couldn't have used all that stock and just taken all of it?

A. I would still say that.

Q. Yes, sir. You had dominion of all of the control of all of it, didn't you?

A. It was charged to me on the books.

Q. And you had actual physical control of all of it, didn't you?

A. It was in the box.

Q. And you had physical control?

A. If that is what you call physical control I had physical control.

Q. I mean by that you could have picked it up out of that box, taken it wherever you wanted to, done anything you wished with it?

A. I could have but I didn't, sir.

Q. Yes, sir. Now, you negotiated for a three and a half million dollar loan from Co-op in 1945?

A. No, sir. $3,200,000.00.

Q. You are right, sir. And when did you start your negotiations with Co-op for that $3,200,000.00 loan?

A. That was very shortly before the terms were agreed upon. I would say maybe two weeks.

Q. Did you ever take up the matter of this loan with any of the Aledo stockholders?

A. I don't think I took it up with them. I don't believe I did.

Q. You never consulted with them about it or notified them that it had been made, did you?

A. No. I did with the Directors.

Q. But I am asking you about Aledo stockholders. You never wrote them a letter, called a meeting about it, did you?

A. I don't think I did.

Q. Now then, with respect to where you got the money to buy this stock. Prior to your $3,200,000.00 loan with Co-op, isn't it a fact, that you had a loan of around $1,000,000.00 with them?

A. It was more than that.

Q. All right. And your million dollar plus loan continued to remain in force and effect until you got your $3,200,000.00 loan, didn't it?

A. That is correct.

[fol. 1365] Q. Now you used part of the million dollar plus loan to buy stock in, didn't you?

A. I think so, yes.

Q. And you used part of the proceeds of this $3,200,000.00 to buy stock in?

A. Yes.

Q. Now you say that these people in Aledo were soliciting you to buy their stock. Just briefly here you did solicit Mr. James to get in stock—we have been over that?

A. Yes, we have been over that, sir.

Q. You also solicited Mr. Ball for his stock, didn't you?

A. Not Mr. Ball directly, I don't believe I ever did. I solicited Mr. James all right. I don't know whether I ever did Mr. Ball or not.

Q. Let me see if I have it right. Did you have James get in the Chicago Bard stock?

A. Well, he sent it in, I am quite sure, yes.

Q. Well, we have read many letters between you and James about getting in stock. Are those letters that you wrote to James to get in stock relating to the Bard stock?

A. Well, it was the Chicago group. We referred to that stock as the Bard stock, yes.

Q. And of course it was James that you were paying a commission to get in stock, wasn't it?

A. That is right.

Q. Then you wanted to get in the Ball stock, didn't you?

A. Yes, sir.

Q. You wanted to get in the Fred Elving stock?

A. I don't remember the Elving stock.

Q. You wanted to get in the Smith stock?

A. I wanted to see Mr. Smith, sir.

Q. You went to Oklahoma to see about getting in the Anderson stock?

A. I did.

Q. And your company wrote a letter to Clark Ranney to get in the Hahn stock?

A. One-half share, yes.

Q. That is right, but you were making a drive to get stock in down to even one-half share there?

A. We certainly were. We didn't want that outstanding.

Q. You wanted to get it down to the last half?

A. That, of course, was in 1947, you are talking about.

Q. I know it but I am continuing about your stock matters in this category.

A. All right.

Q. As a matter of fact, you testified in the Blazer case in 1945 that you were trying to buy stock through anybody [fol. 1366] you could and wherever you could get it, didn't you?

A. I don't recall. I might have.

Q. Well, that was the truth, wasn't it, that you were endeavoring to get stock from any source that you could?

A. I was never soliciting stock, sir. The stock, if I might tell you this, sir, that you speak of, Mr. Smith and Mr. Anderson, I will tell you that I never spoke to anybody that ever sold a share of stock. I asked them if they wanted to sell their stock, and if they didn't want to sell it I would be very happy for them to keep it. I never spoke to one person, never sent in one share of stock, and that goes all the way down the line. So I certainly didn't try very hard or would have made some sales, or I mean I would have made some purchases.

Q. Let's see if we can refresh your recollection here. You gave a deposition in the Blazer case here, I think in this building, on the 11th day of July, 1949, did you not?

A. I think it was, I am not sure.

Q. Do you remember that this question was asked you and you gave this answer:

"Q. Then back in August, 1945, you were endeavoring to acquire stock through the Fourth National Bank?

"A. Through anybody I could."

Does that refresh your recollection that you were endeavoring to get this stock?

A. I can't quite understand that question, sir. I can't say that I could answer that intelligently. I am not so sure about that.

Q. Well, I will read you another question and answer.

A. All right.

Q. And this is from page 49 and page 50 of your deposition.

"Q. Back in August, 1945, you were attempting to buy stock in Chicago to clear through the Fourth National Bank?

"A. That is what it said.

"Q. That is what you said, isn't it?

"A. Yes.

"Q. And that is a fact?

"A. Yes."

A. I still say that.

Q. I am asking you, did you have those questions put to you and did you give those answers?

A. Well, I must have sir. I don't remember.

[fol. 1367] Q. And was that the truth?

A. The truth was I was trying to buy all the Chicago stock at all times after we saw that we couldn't get along with those stockholders. I was trying to buy that stock.

Q. In addition to getting out these letters to James that we have read, we have read many of them, isn't it a fact that you testified that you had Kincade help you get in the stock, particularly the Roos stock?

A. No.

Q. Very well.

A. I don't think he had anything to do with getting in Roos' stock.

Q. I will ask you, sir, if these questions were asked and these answers given, on page 88 of the deposition you gave in the Blazer case:

"Q. Mr. Black, did Mr. Kincade ever assist you in acquiring stock?

"A. Assist me in acquiring stock? In what way?

"Q. Well, by purchase, either for yourself or the Black-Marshall Oil Company?

"A. Yes, he did."

Were those questions asked you and those answers given?

A. I am sure that Mr. Kincade got in some stock, yes.

Q. Well, the question I asked you a moment ago, if Mr. Kincade hadn't assisted you in getting stock and I understood you to say that he had not. Now, what are the facts about it, did he or did he not?

A. I can't answer your question the way you are asking it, sir. Mr. Kincade wanted to sell his stock and he wanted all of his friends to sell their stock. Would you call that an assist?

Q. I am asking you, Mr. Black, did you have Mr. Kincade help you get in stock?

A. I never asked Mr. Kincade to get a share of stock for me in my life.

Q. And you say that Kincade did not assist you at your request in getting that Roos stock?

A. I say that he sent in a lot of stock but I don't recall ever asking him to get in a share of stock, sir.

Q. He just did that of his own idea, did he?

A. No. They were his friends and he wanted them out.

Q. Why did Mr. Kincade want stockholders out?

A. Because he put them in. He put them in the company and he thought it was as good a profit—he thought it was a good profit and he wanted them out. He didn't think we would ever pay off the loan.

[fol. 1368] Q. And that is your explanation of his activities with Roos, is it?

A. Yes, sir.

Q. Now, I want to ask you if you recall of writing a letter to Mr. Ives on March 28, 1947, in which you said that you thought that you could make a sale and get the shareholders about $25.00 a share?

A. I believe I did. That is about what we thought we would get at that time.

Q. Now, if you had of had these old stockholders, treated their share as being valid, that would have been about the right price, wouldn't it?

A. No. I tell you we thought about $25.00. We finally got up to where we thought we would get $40.00 but we didn't know what our assets were at that time and how much of the loan we would have to pay off. We originally thought it was about $25.00 a share. Then we got up to $40.00 a share. We were all very much surprised when we got $50.00 a share.

Q. All right. You say that you didn't consider then that these Aledo people were still stockholders in 1947?

A. I certainly did not.

Q. Then will you explain to the Court how it was that you wrote letters and Mr. Pielsticker wrote letters telling Ives you get your group together now, Landowners is being held out just as we gave you our verbal promise. Why did you make such a statement about a verbal promise to Mr. Ives?

A. Because I told Mr. Ives if he and anyone who had ever been a stockholder could participate in the Landowners if they chose, every one of them.

Q. It is a fact, is it not, that you had told Mr. Ives that in 1944 and 1945?

A. Told him what?

Q. That any sale made the Landowners and undeveloped acreage would be held out?

A. I did not. We tried to sell it in 1945.

Q. When did you first tell Mr. Ives, when did you first give him this verbal agreement that you were going to hold out part of these assets for the old stockholders?

A. The first time I ever told him that we were going to have to keep the Landowners Company was in 1945 when the Co-op told me that they could not purchase the Landowners, and somebody would have to take it out.

Q. So in 1945 then you did tell Ives that you was going to hold out at least the Landowners if you made a sale, didn't you?

A. I told him I would purchase it back.

[fol. 1369] Q. And after 1945 then you considered that you had given your word to Mr. Ives that in any sale, at least the Landowners would be held out, is that right?

A. That is making it a little strong. I don't mean giving a word, but I certainly made my word good with everything.

Q. You had also given your word to the people in 1944 at the stockholders' meeting that you would hold out the undeveloped acreage as well as the Landowners?

A. If we sold the producing properties for $8.00 a share.

Q. You had started in there in 1944 at the stockholders' meeting with a mandate from the stockholders to go out and try and sell the producing properties and get at least $8.00 a share?

A. That is what they asked me to do, yes.

Q. That was the mandate from your stockholders, wasn't it?

A. Yes.

Q. And you were to keep the undeveloped acreage and the leases and the Landowners, that would follow?

A. Yes, I think that is right. When you talk about undeveloped leases, you are not talking about much value in Kansas.

Q. Now then, starting there in the spring of 1944 with that mandate from your stockholders to try and sell your production, you did make an honest effort to try and sell those producing properties, didn't you?

A. I have so testified.

Q. And you made an honest effort to try and sell those producing properties in 1944 and in 1945, isn't that right?

A. That is right.

Q. And in 1946; isn't that right?

A. I don't know about 1946. I am not sure about that. It is too hard to remember the dates.

Q. Didn't you continue to try and sell those producing properties from the time you had the mandate of your stockholders until you finally consummated the sale with the Co-op in 1947?

A. At this minute, sir, I can't recall trying to sell it between 1945 and 1947.

Q. You say you did not?

A. I can't recall.

Q. Very well.

A. At this minute.

Q. This stock that came in to you from Mr. Ives in 1944, what would you do with those shares of stock ordinarily after you would receive them?

A. What would I do with them?

[fol. 1370] Q. Well, I will put it this way. You ordinarily would get in, say, a certificate for 1200 shares from an Aledo stockholder. Then you would take that certificate and have two certificates for 600 shares each made. That was your first step, wasn't it?

A. I believe that is right. They wanted it split, selling half of the stock.

Q. Then you would take and send those two certificates back to Aledo and have Ives deliver one 600-share certificate to the stockholder, wouldn't you? That would be one step?

A. I think that is right, I am not sure.

Q. And you would have Ives get the stockholder to endorse the other 600 shares and send it back to Black-Marshall?

A. In 1944?

Q. In 1944?

A. I don't remember, sir.

Q. Well, you do know that these people sent in a half of their stock at a time, don't you?

A. They sent all their stock at first, in 1944, I think they sent—if they had it in one certificate they sent it all.

Q. That is what I am getting at. All right, let's just take Mr. "X" at Aledo. He sent in by Mr. Ives, who would bring it down on the airplane, we will assume, a certificate for 1200 shares of Black-Marshall common stock, is that correct?

A. Yes.

Q. When Mr. Ives arrived at Great Bend and handed you that certificate for 1200 shares of stock, isn't it a fact that you then split it into two 600 shares?

A. I think that is right, yes.

Q. Then you gave Mr. Ives two certificates for 600 shares each and sent him back to Aledo to deliver one of those to the stockholder?

A. I didn't give him two. I gave him one. I gave him the certificate for 600 shares. Why would I give him both of them?

Q. That is what I want to ask you. You just gave Mr. Ives then the one certificate for 600 shares to take back.

A. I think that is right. I can't remember the details but I think that is right.

Q. Then the other certificate for 600 shares you would sign it as President, right?

A. Yes.

Q. Mr. Ives would sign it as Secretary?

A. Yes.

Q. And that share of stock was made out to who now for 600 shares?

A. It was made out to the person who had the original 1200 shares.

[fol. 1371] Q. Made out to the original stockholder, wasn't it?

A. Yes.

Q. Well now, how do you explain, if these people weren't stockholders and weren't sending in their stock contingent upon you getting sale, why was that particular 600 made right back to the original stockholder?

A. Because they only wanted to sell half of their stock. They were hedging their bet. They were getting their money out of it. They were only selling half of their stock.

Q. I guess I don't make my question plain enough. We will say that Mr. Danford comes in or his 1200-share certificate comes in by Mr. Ives?

A. Yes.

Q. Mr. Ives hands you that for 1200 shares. Now, Danford is selling 600 shares?

A. Yes, sir.

Q. You made out two certificates for 600 shares apiece, didn't you?

A. That I don't know.

Q. You were the President?

A. Well, I am telling you that I can't tell you whether we made out two or one.

Q. Let me see if I can outline it and then see what you have to say about it. You would take that certificate that Mr. Ives handed you of Doctor Danford's, 1200 shares, you would go to the stockbook and you showed that cancelled or retired but you issued two new ones for 600 shares apiece, didn't you?

A. We will have to look at the stockbook. I don't recall. It is certainly in the stockbook.

Q. Then after you got two certificates for 600 shares apiece you gave one of them to Mr. Ives and he would take it back to Aledo and give to Doctor Danford, we will say, but the other one for 600 shares——

A. I don't believe that is correct, sir.

Q. All right, will you explain to the Court just how you handled it?

Mr. Siefkin: Just a moment. I object to it as not the best evidence. It is all in the stock record.

A. It is all in the stock record. I can't remember those details, sir.

The Court: If he remembers he may testify.

A. Sir, I can't remember that, I really can't.

Q. Well, just a moment: I will get just give one illustra- [fol. 1372] tion. While we are looking for that I will ask you or I will go to another matter and I will come back to it in a moment. Now, for the sake of a few figures, you do recall that in 1945, you sent out to Mr. Ives at one time

$248,750.00, which he deposited in his account and thereafter wrote checks upon to gather in this stock. You do not dispute that, do you?

A. Some such amount. I do not dispute it. I don't know what the amount was.

Q. And in addition to that do you recall that on or about November 7, 1944, you sent Mr. Ives another sum of $80,121.64 to be used for the same purpose?

A. We already had the stock, sir, and that was to pay for it.

Q. As a matter of fact——.

Mr. Siefkin: Mr. Walker, you got the date wrong on the first question you asked. You asked about 1945.

Colonel Walker: It should be 1944. Thank you.

Mr. Siefkin: Yes.

Q. So in 1944 you sent out to Mr. Ives about three hundred twenty-eight thousand plus dollars to pay for stock he was picking up from this Aledo group?

A. We already had it, we had had it a long time, sir, before it was paid for.

Q. I appreciate that, but we are not quibbling about which arrived first.

A. I beg your pardon, sir. You said to pick up the stock.

Q. To pay for stock which was picked up in Aledo?

A. Previously, yes.

Q. Very well. Now, do you recall that in 1944 or 1945—pardon me—now, Mr. Black, on the way that you handled these certificates that Ives brought in let's see if we can just trace a sample one through?

A. All right, sir.

Q. I am now calling your attention to Plaintiff's Exhibit Number 102 and to Certificate Number 226, which appears to have originally been made out to Fred O. Brown for 300 shares and it is dated the 4th of September, 1942. Have I stated the matter fairly there?

A. That is right.

Q. All right. Now that certificate to Fred O. Brown which was dated the 4th of September, 1942, bears a notation in red pencil on the certificate that it was cancelled on 3-20-45, does it not?

A. That is correct.

Q. And says to see Certificates 364 and 381. Now, in Cer-
[fol. 1373] tificate Number 226, we have just been referring to, shows on the back that Fred O. Brown, on October 26, 1944, assigned that certificate of stock for 300 shares in blank, doesn't it?

A. Yes, and witnessed by Mr. Ives.

Q. And witnessed by Dale G. Ives?

A. That is correct.

Q. Now then, do I understand that this assignment by Fred O. Brown on October 26, 1944, on the back of Certificate 226, would indicate that that share of stock was probably one of those that Dale Ives brought in during 1944; would that be your deduction?

A. I would presume so, sir.

Q. Very well. Now let's assume then that that Certificate Number 226 came in after October 26, 1944, which stood in the name of Fred O. Brown, and I now call your attention to Certificate Number 364, which is in Plaintiff's Exhibit Number 100 and ask you if it isn't a fact that Certificate Number 364 shows that there was issued to Fred O. Brown on the 20th day of March, 1945, 50 shares of the common stock of Black-Marshall?

A. That is right.

Q. That is what the certificate would show?

A. That is what it says.

Q. All right. Now let's turn to Certificate Number 381 and that shows that Fred O. Brown was issued 250 shares of common stock on the same date, to-wit: the 20th day of March, 1945?

A. All right.

Q. Now that is your signature as President on Certificate Number 381, isn't it?

A. Yes, sir.

Q. And that is your signature as President on Certificate Number 364?

A. Yes, sir.

Q. And that is the signature of Dale Ives on each of the two certificates, right?

A. That is right.

Q. Well then, it appears that when this certificate of Fred

O. Brown for 300 shares came in that there was one certificate made out to him for 50 shares, to-wit, Certificate Number 364, and another certificate for 250 shares, to-wit, Certificate 381. Am I correct?

A. That is right.

Q. Now my question is: This was probably a case where there was some other stock sent in and it wasn't split right square down the middle but it will serve our purposes to find out what I wish to interrogate you about. If Mr. Fred O. Brown was wanting to sell his stock and sent it in by Mr. Ives why wasn't the full 300 shares just cancelled out?

A. Why wasn't it cancelled out?

[fol. 1374] Q. That is right, when Mr. Ives brought in 300 shares that a man wanted to sell, why wasn't it just cancelled out?

A. Why would it be cancelled out if it went to somebody else, sir? If the stock didn't go to the company it would have cancelled out. I don't believe this stock went to the company.

Q. The only authority you had was to buy stock for the company, wasn't it, Mr. Black?

A. I was selling that stock to anybody that wanted to buy it at that time, in 1944, sir.

Q. You were?

A. Yes, sir.

Q. Then if I understand you——

A. I was trying to find a market every place for it and everybody knows when you have got a company you ought to try to establish a market for stuff.

Q. Let's come at it another way. When Mr. Fred O. Brown then sent in his certificate for 300 shares you had no intention of using company funds to retire or cancel it at that time, did you?

A. I can't answer that, sir.

Q. Well at least you didn't do that, did you?

A. I don't think we did.

Q. You didn't do it. Now, you did issue a certificate for 250 shares and another one for 50 shares, right?

A. That is what this looks like.

Q. And both of them were made out to Fred O. Brown, right?

A. Yes.

Q. All right, my question is: If Mr. Brown was to only get back, let's say, the certificate for 50 shares, what was the purpose of you and Ives making out the one for 250 showing Mr. Brown's name?

A. That could have been a larger bunch of stock, sir. We would have to have the stock analysis. I can't possibly remember all of these transactions and these details. The stock analysis would have to show that and I assure you that I can't answer that.

Q. I am not trying to quiz you about any isolated transaction now. I am asking you about an overall plan that was carried out in all of these stock certificates and I think all of these stock certificates will bear us out.

A. I don't believe it would, sir.

Q. You don't think it would?

A. I really don't think it would. I think you are mistaken.

[fol. 1375] Q. You want to say that I am mistaken when I say that people in Aledo would send in to Ives, a certificate of stock and then it would be split up and you would make out the two new certificates right back to the same person but only send one of them back to Aledo?

A. No, I don't say that.

Q. You don't think I am mistaken?

A. I don't think we made out two certificates at all. I think this particular one you bring out here had something to do with some other stock.

Q. Very well, I don't want to entrap you with an isolated transaction. We will find some others. But in the meantime I will proceed with another matter. Do you recall using company funds to buy 11,714 shares?

A. Yes, sir.

Q. Do you recall whose stock you used to issue to yourself Certificate Number 398 for those 11,714 shares?

A. I don't remember but I could certainly look at the records and show you and tell you.

Q. All right, sir. If Mr. Siefkin will follow me I think I can give these names correctly from it. Now if it be a fact that on Certificate Number 398, which you issued to yourself

for 11,714 shares, that that was made up of Certificate Number 77, from Spencer Berglund for 1110 shares and from Dale G. Ives for 150 shares; from Vernon T. Clark or Grace M. Clark for 165 shares; from Berglund for 140 shares; from Gerald C. Baldwin for 50 shares; John S. Bowers for 125 shares; Dorothea Britton for 37 shares; H. E. Britton, 375 shares; Fred Brown, 250 shares; Donald C. Clark, 37 shares; Hazel Constant, 425 shares; Dale G. Ives, 5,000 shares; Mabelle Lundblad, 125 shares; Myrtle Lundblad or Mabelle Lundblad, 925 shares; Annabelle McClanahan, 25 shares; Harry Ogle, 125 shares; Maude T. Rogers, 1,775 shares. Would you say that those are approximately the people whose stock you used to make up the 11,714 shares certificate?

A. I think that is correct.

Q. Every one of those people were Aledo people, weren't they?

A. Yes. This stock came in in one bunch. That is the reason there were that many shares in that group. It came in at one time.

Q. You were familiar with those names?

A. Yes, sir.

Q. And you knew that that was part of the Aledo stock-
[fol. 1376] holders' stock that they had had at one time, didn't you?

A. Yes, sir.

Q. You issued to yourself this certificate for 11,714 shares of stock of these Aledo people in 1946, didn't you?

A. The date I can't recall. It was possibly 1946.

Q. Well, it was August 15, 1946.

A. What ever the certificate says.

Q. I think Mr. Siefkin and I can agree upon that date. Now, that was about seven or eight months after you had received this Ives letter to you telling you exactly the falsehoods he had told in getting that same stock, wasn't it?

A. Sir, I bought that stock when it came in. I just did not—I had not transferred it to my name, sir. It was in the street certificate.

Q. The question, sir, is that you issued Certificate Number 398 for 11,714 shares of stock and which stock had come from these Aledo people and you did it after you had re-

ceived word from Ives that he had falsified to these people in getting the stock; you did that, didn't you?

A. I issued the stock, yes.

Q. And you used it?

A. Yes.

Q. And you sold it for $51.06 a share?

A. That is correct.

Q. Now, Mr. Black, a moment ago we were trying to follow a typical stock matter in 1944 and 1945 and as I understood, you thought perhaps it was an isolated transaction, and what I want to do is to show the Court the trend of this thing if it is possible.

I want to call your attention now to Plaintiff's Exhibit Number 98, and referring now to Stock Certificate Number 147, which appears to have been issued to Gerald C. Baldwin for 100 shares of common stock of Black-Marshall on the 7th day of January, 1941. It bears the endorsement "W. H. Black, President, Dale G. Ives, Secretary." Is that your signature on Certificate Number 147?

A. Yes, sir.

Q. Is that the signature of Mr. Ives?

A. Yes, sir.

Q. And that appears to have been an initial issue of stock to Mr. Gerald C. Baldwin for 100 shares, doesn't it?

A. It says a number of the original certificate here, 143, sir. Number of the original certificate 143. Number of original shares, 100. Number of shares transferred 100. So it was not an original I don't believe.

[fol. 1377] Q. All right, you don't think that was an original. Originally Doctor Danford had bought a hundred shares of stock on Certificate 143?

A. That is right. This was transferred from Doctor Danford.

Q. Then Doctor Danford had that cancelled and that same 100 shares was issued to Gerald C. Baldwin, right?

A. Yes, sir.

Q. What I mean is this was an initial issue to Gerald C. Baldwin?

A. It was not an original issue.

Q. All right. Here is where Baldwin starts out with his stock though?

A. Yes.

Q. All right. Now, Gerald C. Baldwin got that 100 shares of stock on the 7th day of January, 1941, Certificate signed by you and Mr. Ives. Now then, on the back of Certificate Number 147 shows that Gerald C. Baldwin signed and endorsed this in blank on October 26,.1944, in the presence of Dale G. Ives?

A. That is correct.

Q. T[redacted] is correct, isn't it?

A. Yes, sir.

Q. I notice quite a bit of this bears the date of October 26, 1944?

A. I think you will find that all of that group that you are referring to, the 11,000 shares——

Q. What was the purpose of your filling in that date?

A. I didn't fill it in. Mr. Ives filled it in.

Q. What was Mr. Ives' purpose of using that date; is there any significance to it?

A. Not that I know of.

Q. All right. In any event then we may assume that Mr. Baldwin endorsed this in blank and Mr. Ives brought this certificate to Great Bend and then isn't it a fact that you issued to Mr. Baldwin Certificate Number 349 for 50 shares of common stock of Black-Marshall, you signed it as President, Dale Ives signed it as Secretary?

A. In 1945?

Q. And dated the 20th day of March, 1945, and on the same date didn't you also issue to Gerald C. Baldwin 50 shares of common stock signed W. H. Black and Dale G. Ives?

A. That is correct.

Q. All right. Then was I not correct a moment ago in asking you if the pattern wasn't this: That Gerald Baldwin or any other stockholder ordinarily would send in their certificate, you would take that certificate for 100 shares, you would cancel it but immediately issued two certificates for 50 shares right back to Gerald Baldwin?

[fol. 1378] A. I still don't believe so. It could be true. I don't know whether it makes any difference one way or the other, I don't know. You have showed me two certificates and they could be in—this man didn't own any original stock, it was transferred to him and we would have to

have a bookkeeper or auditor or somebody that handled it. I didn't handle it so I don't know, sir.

Q. Well, Mr. Black, the fact is that that was the overall manner that you handled all of this stock that you got from Aledo in 1944, that you kept half, you sent back half, but the half that you kept in Great Bend still was endorsed to that original stockholder, wasn't it?

Mr. Siefkin: I object to that for the reason that that is not borne out by the record. I think Colonel Walker is mistaken on that.

Colonel Walker: Well, when I say half, some of them might have been a little more or a little less.

Mr. Siefkin: I don't think they issued two certificates back. They may have done it in isolated cases but on that 100 shares there were only 50 issued back, wasn't there?

Colonel Walker: No, there were two fifties.

Mr. Siefkin: Well, that is an isolated case then.

A. I believe it, sir, because I don't recall——

Mr. Siefkin: Anyway, the record shows and we can get it from the record. I know the witness won't know and I am quite sure that I don't know.

Q. Let me change my question. Why would you, if Mr. Brown wasn't still a shareholder contingent upon a sale being made, why would you issue two certificates for 50 shares each?

A. I still don't understand you.

Q. All right, I will make it plainer. Mr. Brown, according to the way you tell me, wanted to sell a hundred shares of stock. If he couldn't sell a hundred he wanted to sell 50, right?

A. Again I will tell you some of those people wanted to split their certificate up, of stock, whether they were not selling—I believe that what you picked out there—I am not sure but I believe that would be right. A lot of times people have a certificate they would want to send [fol. 1379] in and split it up for their own purposes. I don't know why. Maybe he would want to give half of it to his wife or something. I am not sure about that. But we would have to take the records on that, sir. I am not smart

enough to remember those details but I assure you that we could tell it from the records.

Q. Well, Mr. Black, just a moment ago we read the list of people whose stock made up your 11,714 shares and did you notice that Mr. Gerald C. Baldwin's shares that we are talking about went right into your Certificate Number 398 that you sold?

A. We would have to ask an auditor, sir. I really couldn't possibly know.

Q. I am asking Mr. Black?

A. Mr. Black does not know, sir? I wish I could tell you. I don't know.

Q. Can you give the Court any explanation why Mr. Baldwin would send in 100 shares of stock, you would issue two separate certificates for 50 shares each, send one back to Baldwin and you kept the other 50 shares in his name and it wound up when you made a sale to Co-op?

A. They were not endorsed. Maybe they were sent back for his endorsement, it could have been that.

Q. You just can't explain it, can you?

A. No, sir.

Q. Is this a fair assumption, that when a person sent in stock to Black-Marshall, a bonafide sale to be cancelled out, you didn't do any reissuing of that stock, did you?

A. To be cancelled out?

Q. That is right.

A. What do you mean "cancelled out?"

Q. If I had had 100 shares of Black-Marshall and you called it in, it was a bonafide, a company transaction, I would have sent in my 100 shares and you would have paid me my money and you would have cancelled my stock, wouldn't you?

A. We didn't cancel the stock. We didn't know what we were going to do, whether we were going to put it in the treasury of the company—we don't know whether we could cancel it out or what. There was a difference of opinion from our attorneys and auditors as to how we could handle it.

Q. Since you brought that up that brings me to another matter.

A. Yes, sir.

Q. I have heard time after time the statement made by you, Mr. Black, that you didn't know what to do with it and [fol. 1380] I read that in your deposition and I read it in the Blazer case. The stockholders had a meeting and told you what to do with this stock before you ever acquired it, didn't they, and they told you to buy that stock and show it retired or cancelled, didn't they?

A. No, sir.

Q. Very well, just a moment. You mean to tell us here that the stockholders hadn't told you that you were authorized to buy stock in providing it was—I think it was either retired or cancelled——

A. I think that is correct, sir.

Q. All right.

A. I believe that that is correct but that still didn't give me—I was not assured from the attorneys whether or not that was legal or not because there was some question about the by-laws of the company, and I am not sure but what those by-laws were changed by Mr. Ives so that we could do that later.

Q. Do you think that he may have changed them?

A. I think so. There was quite a long drawn out discussion of whether or not the company had a right to cancel that stock out or put it in the treasury.

Q. Well now, let's listen to this minute here.

A. Yes.

Q. This was on the 6th day of December, 1944, and of course I presume that was before you bought the 1945 stock, wasn't it?

A. I would think so.

Q. Yes. Now, let's see what it says here. First of all it says that W. H. Black presided over the meeting and then it says here:

"On motion duly made, seconded and unanimously carried the following resolution was adopted:

"Resolved that the by-laws of the Black-Marshall Oil Company, a corporation, hereby be amended to provide that W. H. Black, as President of the said corporation, be and he is hereby authorized in behalf of the corporation to purchase all or any part of the outstanding common stock of the Black-Marshall Oil Company that is available or offered

for sale at a price to be agreed upon by the Directors of said corporation, said stock to be purchased for the account of the corporation and considered as treasury stock to be retired on the books of the corporation."

A. What is the date of that?

[fol. 1381] Q. The date of that, if I am not mistaken, sir, was the 6th of December, 1944.

A. That is right.

Q. Now, let's just look at that a moment. It says here that W. H. Black, as President, of this corporation, he is authorized in behalf of the corporation to purchase stock. You understood that, didn't you?

A. Yes, sir.

Q. You understood that that meant you were buying stock for the corporation and not W. H. Black, didn't you?

A. After that time I am sure we did, sir.

Q. All right. It further says that "said stock is to be purchased for the account of the corporation."

A. I think every share was after that date.

Q. But notwithstanding this by-law you juggled that stock around in 1944, 1945, 1946 and 1947 and said that you didn't know what to do with it, didn't you?

A. Yes, sir.

Q. You didn't obey the mandate of your stockholders, did you?

A. That stock, all of this stock from the date of that meeting, was bought for the company and retired by the company, sir, from the date of that meeting on.

Q. Do you recall that Mr. Siefkin in his direct examination asked you about this stock and you said it was yours and in your name and you could have taken all or any part that you wanted?

A. It was charged to my account, sir.

Q. And hadn't it been about thirty minutes ago that I asked you if you didn't have the physical control and custody of it to do anything you wanted to with it?

A. I said it was in the company lock box.

Q. That is right. So all this talk about not knowing what you were supposed to do with that stock after December 6, 1944, all you had to do was obey the by-laws of your stockholders, wasn't that correct?

A. Yes, sir, but our auditors told us they didn't think we could do it and they carried it on our account in a special—carried it on our account in a special footnote in our statement.

Q. How much of this common stock did you have in your lock box during 1945, 1946 and 1947?

A. How much, I couldn't answer that, sir.

Q. In round numbers?

A. Well, we had all the stock that was not cancelled.

Q. Didn't you testify at one time that there was approx-
[fol. 1382] imately 80,000 shares?

A. I would presume there was that much or more. My own stock was in there with it. All of it was in there.

Q. Isn't it a fact that in June of 1947 you had in your lock box at that date at least 68,114 shares and that you took 11,714 shares and sold to the Co-op and you marked 56,400 shares retired?

A. The amounts I can't recall, sir.

Q. Would that be the approximate amounts?

A. I would think that is approximately right.

Q. Then when you sold this stock to the Co-op in connection with this overall deal that we will go into a little later, you settled your account with the Black-Marshall by simply a bookkeeping transaction, didn't you? That is, Black-Marshall had you charged on their books according to your Directors for one million two hundred odd thousand dollars?

A. I think that is about right.

Q. You never did pay that million two hundred odd thousand dollars until you sold to the Co-op and then you made a bookkeeping transaction that settled your account?

A. I paid for that. I paid for the 11,000 shares. The other was cancelled, sir.

Q. By the way, first of all, but you simply settled your account with a bookkeeping transaction, didn't you?

A. Settled it with a check.

Q. I beg your pardon?

A. I settled it with a check, paid for it.

Q. Did you have one million two hundred odd thousand dollars that you ever paid in cash?

A. No, we cancelled—I think there were 56,000 shares of the stock, approximately that many, that belonged to the

company that was charged to my account and that was a bookkeeping entry. The other was paid for by myself.

Q. One other question about the 11,714 shares. You have told the Court that you sold that for $51.06?

A. I think that is right.

Q. What did you charge yourself for that stock at the time you took it?

A. $10.00 a share.

Q. $10.00 a share. At the very time that you were getting in this 1945 stock you were paying those Aledo people at the rate of $12.00 a share at that time, weren't you?

A. At what time?

[fol. 1383] Q. In 1945?

A. Yes.

Q. At that very same time you were paying Mr. Kincade $17.50 for the stock he was turning in, weren't you?

A. That isn't correct.

Q. That isn't correct. Permit me to read to you Plaintiff's Exhibit 113, from Arthur Kincade to Mr. W. H. Black, dated October 17, 1945.

"Dear Bill:

I am enclosing herewith six stock certificates representing 7,000 shares of the stock of your company described as follows:"

Thereafter he describes them.

"—which I would like to surrender to the company at $17.50 per share for a total consideration of $122,500.00. Since I am an official of the bank I would prefer that you issue your company's check rather than have me charge the account as we are now doing with other stockholders. This will reduce my holdings to 3,000 shares which represents the original stock acquired in the Armer exchange.

Bill, I realize fully that I am penalizing myself considerably by surrendering the stock at this price."

Pausing for a moment. Was he penalizing himself?

A. I don't think so.

Q. All right. Now, coming down a little further in the letter.

"I do not know what your holdings are in your own company, but the price is now established and the Government would have to appraise it at $17.50 per share or more."

and continuing further:

"I never had an association in my life that has been more agreeable than our association, and I hope it will always continue to be so. The sale of this stock will accomplish everything I need to do at the moment, and I am very happy about it. You might return for credit my check given you sometime ago, and we will clear that matter up also.

Very truly yours."

[fol. 1384] Now, in view of that letter do you still want to tell the Court you weren't paying $17.50 a share for Kincade's stock?

A. Yes, but not at the same time we were buying the other.

Q. When did you buy the stock from the Aledo people?

A. We bought it quite sometime before that, sir, quite sometime. I would say from two to three months before that.

Q. Let me ask you another thing about the Kincade letter here. You had known Kincade for how long before 1945?

A. I had known him since 1939.

Q. And had a great many dealings with him, hadn't you?

A. Yes, sir.

Q. You told us the other day you were in partners in the gravel business and the bank business, I believe, the oil business, Ferrell-Young and many other ventures, weren't you?

A. That is right.

Q. He had been elected a director for Black-Marshall at one time, hadn't he?

A. Yes, sir.

Q. You would send him copies of your audits that were made, his bank, I mean?

A. I believe that is right.

Q. That is right. Now, I notice here that Arthur Kincade, with all of that relationship with you, makes this statement:

"I do not know what your holdings are in your own company."

Can you explain how it was that Mr. Kincade didn't know what your holdings were?

A. I can't explain Mr. Kincade, sir. I don't want to try to, I couldn't.

Q. Now then, if Arthur Kincade didn't know how many shares you were claiming to own it wouldn't be much of a mystery that the Aledo people didn't know either, would it?

A. Well, at the time he wrote that letter it could have been possible I could have sold some or bought some more, how would he know?

Q. Now then, you have heard these Aledo people testify in this case, haven't you, Mr. Black?

A. I have, sir.

Q. And do you recall a number of them testified that Mr. Ives told them that after they sent in their last half of their stock in 1945 you were going to hold out the Land-[fol. 1385] owners and the undeveloped acreage and it would be a little while before they would start up?

A. Yes.

Q. You heard them testify, many of them, along that line?

A. Yes, I did.

Q. Well now, as a matter of fact, you sent word to several people that in this deal you would be tied up yourself?

A. I didn't send word to several people. I can only recall sending word to one person, sir.

Q. Who was that?

A. I think it was Mr. Constant out in California.

Q. Mr. Constant?

A. I believe it was.

Q. Well, let's see if you didn't send it to others. Before I go to this next matter I want to finish up my questioning about Kincade. My question was to you whether or not at the same time you were paying the Aledo people $12.00 if you, at substantially the same time, were paying Kincade $17.50? I call your attention to the Kincade letter to yourself of October 17, 1945, which is Plaintiff's Exhibit Number 113, and I also call your attention to a voucher Number 9-34, and the date paid was 9-29-45, and it is Plaintiff's Exhibit Number 108, and ask you if on September 29, 1945, you

didn't cause to be sent $270,438.00 to pay for the Aledo stock, including the Baldwin, the Amens, the Danford, the Lundblads, Rogers, Sherrards and others?

A. I think that is correct, sir, but the stock had been bought a long time before that. We just were not able to pay for it.

Q. When do you say it had been bought?

A. Whenever it was sent in. I don't remember the date, sir, but it was quite awhile before that, sir.

Q. Now, then, about this matter of Ives telling people that you would be tied up with the Co-op, or this deal would have to wait. I inquired about that a moment ago. I will ask you if you didn't write Mr. Clark Ranney a letter which has been marked Plaintiff's Exhibit Number 358 and, among other things, in which you said:

"It looks like we have made a deal, but not the kind we anticipated. We will be left with some of the properties, tools, materials, etc. So it will take another bunch of drilling and probably another year to effect a complete liquidation. So Black is stuck for a while longer. We won't have the final approval on our deal until September [fol. 1386] 5th but I feel sure it is a deal."

A. What was the date of the letter, sir?

Q. Well, I will hand it to you, sir, and you examine it and state whether or not you wrote that letter?

A. Yes, that is my handwriting.

Q. All right.

A. I don't see the date on it, sir.

Q. Well, you didn't date many of your letters, did you, Mr. Black?

A. I dated some of them.

Q. Didn't you have a custom or a habit, let us say, of just putting on the day of the week?

A. Yes.

Q. Well now then, in that letter you say that you think the deal will be closed by the 5th of September and you are going to keep out tools and other stuff?

A. Yes, that is what I said.

Q. All right. So you were telling Mr. Ranney in that letter that you were going to be stuck for awhile longer

and would take about a year before you could start up with this drilling and development, didn't you?

A. Let's read that again.

Q. All right, you read it.

A. Yes. Would you mind reading that to the Judge again?

Q. "It looks like we have made a deal but not the kind we anticipated. We will be left with some of the properties, tools, materials, etc."

Now, was that correct, the deal that you were contemplating?

A. Yes, we had every kind of a deal.

Q. You were going to keep out your Landowners and undeveloped acreage and some machinery to operate with, weren't you?

A. At one time we did.

Q. That is right.

A. Yes.

Q. And that was in 1945 you wrote this letter, wasn't it?

A. Yes, sir. I believe it was 1945.

Q. You told Clark Ranney what you were going to do about holding out tools and machinery and properties. You also told Dave Ives that, didn't you?

A. I think that is exactly right, sir. I think that is what we were talking about.

Q. All right. You knew at that time, as you have testified, that Dale Ives was your means of communicating with knowledge to the Aledo group, didn't you?

A. Yes.

Q. Yes. Now continuing with the letter you asked me to read:

[fol. 1387] "It will take another bunch of drilling and probably another year to effect a complete liquidation. So Black is stuck for a while longer. We won't have the final approval on our deal until September 5th but I feel sure it is a deal.

I expect to be in S. F. this week end and hope to see you there. Please give my love to Bill and my best to you and Glad.

BILL."

Q. You wrote that letter?
A. Yes, I did.

Colonel Walker: We offer in evidence Plaintiff's Exhibit Number 358.
Mr. Siefkin: No objection.
The Court: It will be admitted.

(Plaintiff's Exhibit Number 358, having been offered and admitted in evidence, is contained in the case file.)

The Court: I believe we will take our recess at this time.
The Bailiff will announce a ten minute recess.

(Thereupon, a short recess is had; whereupon, the parties appearing as before, the following further proceedings are had:)

Q. Mr. Black, going back to the Wadleigh letter, that is where Mr. Ives said you wanted to know what to write Wadleigh, and then Ives told you what to tell him. You never did write Wadleigh, did you?
A. I don't believe I did.
Q. Now that letter from Ives to you telling you what to write Wadleigh, and which is Plaintiff's Exhibit Number 12, was dated November 10, 1945. About twenty days later you did write a letter to K. D. Constant out in California, didn't you?
A. Yes, sir.
Q. And that is Plaintiff's Exhibit Number 84. Now Constant had also written to you just asking what sort of a transaction this was, hadn't he?
A. Yes.
Q. This was in the fall of 1945. You knew the Constant people, didn't you?
A. Yes, sir.
Q. You knew that they had parted with the first half [fol. 1388] of their stock in 1944 and the last part of it in 1945, isn't that right?
A. That is correct.
Q. And when you got this query from them just what the producing properties had brought and what the taxes

were and whatever the query was in that regard, I will ask you if you didn't write the Constants to this effect:

"November 30, 1945

Mr. K. D. Constant, Box 722, Leucadia, California.

Dear Kenney: Answering yours of November 21, I am afraid it will be impossible for me to make clear to you the many ramifications involved in our recent deal. I expect to be in California over the holidays and will see you then and explain the whole thing to you in person. It is quite complicated and I am sure it will be confusing if I try to explain it in my letter. From the looks of the present set-up, I will be tied up with it for an indefinite period."

Now then, what was complicated about bringing or writing the Constants that your deal had fallen through with and you would be glad to send them back their stock?

A. Mr. Walker, if you will remember and look at that letter, I didn't say anything about a sale. I said a deal and I assure you even today that is one of the most complicated contracts that I ever saw. I didn't have any way in the world to explain that kind of a contract to anybody in a letter. It was a twenty-five or thirty page contract and I don't know how I could explain that in a letter to anybody, even today.

Q. Well, you knew what the Constants wanted, they wanted to know this: They had sent in their stock under the promise—pardon me—now let's just follow the sequence of this.

A. All right.

Q. You knew that Constants had been stockholders at Aledo, right?

A. Yes, but they were living in California.

Q. That is right. You knew that the Constants had turned in half of their stock in 1944 and half of it in 1945?

A. That is right.

Q. You knew that on November 10, 1945, just twenty days before you wrote the Constants, that you had a letter from Dale Ives telling you he had secured all of this stock by [fol. 1389] fraudulent and false statements, you knew that, didn't you?

A. When he wrote me, that he had told the people in Aledo there——

Q. So you knew then what Ives had told these people? Then you get a letter from the Constants making an inquiry about what the producing properties had brought?

A. Did I say producing properties?

Q. Well, what was the nature of their query?

A. I don't know. You have the letter.

Q. No, I don't have it.

A. You don't have the Constant letter?

Q. No, you have your letter file. You say in your letter: "Answering yours of November 21,"—your attorneys have the file. Let's see the letter of November 21st if it is there.

Mr. Siefkin: Isn't that in evidence?

Colonel Walker: I don't know.

Mr. Siefkin: I believe so. I think the letter from the Constants to Black is in evidence.

Mr. Lucente: We have never seen it.

Colonel Walker: I have looked for it.

(Colloquy here is had off the record.)

A. I don't remember the letter but I couldn't tell you what was in the letter, sir.

Q. Well, the nature of it was, don't you recall that Mrs. Constant, and I think she is sitting here in the Courtroom, she testified that she wrote you asking for a little information about this sale which Ives had reported to her had been made of the producing properties. You remember Mrs. Constant testifying?

A. Yes, but I don't remember just what she testified to.

Q. All right. There was nothing unusual about a stockholder or two writing and asking you, well, how much did you get, Bill, and how much was the debts and just what kind of a deal did you make?

A. I thought we were very close friends, sir.

Q. Yes, and you knew after this letter that you got from Dale Ives, less than twenty days before, that there might have been some skulduggery on the part of Dale [fol. 1390] Ives, didn't you?

A. I still wouldn't know how to answer it.

Q. All right. So when Mrs. Constant or Mr. Constant wrote you for some information about it you fixed up this jargon to throw them off the track, didn't you?

A. I wouldn't call it jargon, sir.

Q. Let's see if we can make any sense out of it. First you say:

"I am afraid it will be impossible to make clear to you the many ramifications involved in our recent deal."

A. Yes.

Q. And then you say:

"It is quite complicated and I am sure it will be confusing if I try to explain it in a letter."

A. Yes, sir.

Q. Now, this explanation was very clear, wasn't it? I will withdraw that. Then you say:

"From the looks of the present set-up I will be tied up with it for an indefinite period."

A. Now, say that again, sir?

Q. You told her from the looks of the present set-up you would be tied up with it for an indefinite period. You made that statement, didn't you?

A. I certainly did.

Q. Yes. And you told Mr. Clark Ranney in a letter that has just been introduced you were going to be tied up with it about a year?

A. That was in 1944, sir. That was before this letter was written.

Q. I beg your pardon?

A. That was before the loan was even made I wrote Mr. Ranney.

Q. I may be mistaken here, but didn't you testify less than thirty minutes ago that you wrote this letter in 1945?

A. Yes, before the loan was made, I am quite sure, sir. We thought we were selling the property when I wrote him.

Q. Is this Plaintiff's Exhibit Number 358 written in 1944 or 1945?

A. I am not saying it was written in 1944. I say it was before the $3,200,000.00 loan was made.

Q. That is what I am getting at. Exhibit Number 358 you wrote in the fall of 1945, didn't you?

A. I don't know that it is the fall of '45. It was before the loan was made. We were still trying to sell the property.

[fol. 1391] Q. All right. Now then, coming back to this matter, you further told the Constants here:

"I expect to be in California over the holidays and will see you then and explain the whole thing to you in person."

Now, of course, you did go and see them and explain it, didn't you?

A. I did not.

Q. You did not, did you?

A. I didn't have time to see them.

Q. And you never had any intention of explaining it to them, did you?

A. Why would you say that, sir?

Q. Because you knew after getting this letter from Ives that this whole thing was tainted with fraud and you didn't dare go and try and sit down and explain that to these people, did you?

A. I would have certainly explained it to them had I seen them, sir.

Q. And wasn't that the reason that you put up what I referred to as "double talk" in here about it being complicated and you can't explain it and so forth?

A. I don't know how you could explain it.

Q. Now then, another matter, sir. There has been introduced here by the defendants a statement, or a letter, Defendant's Exhibit L from Mr. Pielsticker to Dale Ives about the Landowners, written September 13, 1947. Now, isn't this the fact: That you had told Dale Ives—I withdraw that. Isn't this the fact of this overall picture: You told the stockholders in 1944 that all you were going to sell was producing properties and keep out the undeveloped leases and Landowners?

A. We tried to sell that.

Q. We agree on that.

A. We tried to sell the producing properties.

Q. Then following that you learned in this letter of Dale

Ives to you that he had obtained this stock in Aledo by telling the people that all that had been sold was the producing properties, didn't you, in substance?

A. We hadn't sold the property, sir. We didn't sell the properties at that time. We couldn't sell the properties. They still wanted to sell their stock.

Q. Well, let's start again.

A. All right.

Q. You started out with authority to sell producing properties, right?

A. That is right.

Q. You learned that Dale Ives had told the people in [fol. 1392] Aledo that all you were selling was producing properties, didn't you; you learned that?

A. Maybe, maybe not. I don't remember.

Q. Well, you learned it when you got this letter from Dale Ives on November 10, 1945, didn't you?

A. Yes, but that was a long time after we bought the stock, sir.

Q. All right. Now, carrying that on through, you say here in your letter and Mr. Pielsticker says in his letter to Dale Ives that Mr. Black gave you his verbal promise that this Landowners was to be held out to you, Mr. Ives, and your associates?

A. After I had bought the Landowners, that is right.

Q. So you were carrying out a part of what you had promised to do back in 1944, weren't you?

A. I can't connect it with 1944, sir.

Q. All right, let's start again. In 1944 you got authority to sell producing properties?

A. That is right.

Q. But you were to keep out Landowners and the undeveloped acreage, right?

A. Yes, that is right.

Q. And it was contingent upon that early——

A. I think we were to keep out—we were to sell the producing properties and all of the non-producing properties necessary to make a deal but we did not, of course, make a deal.

Q. And when you called Dale Ives in 1944 and 1945 and told him that you thought you had a sale you told him

that it was a sale of the producing properties and you was holding out Landowners and undeveloped acreage, didn't you?

A. Not undeveloped acreage.

Q. Well, non-producing acreage, however you want to describe it?

A. I would say the Landowners was the only thing we hoped to hold out at that time in 1945.

Q. Then when you finally made your——

A. In fact, may I just have one second, sir?

Q. Certainly.

A. In 1945 we didn't even hope to hold out the Landowners. They had the Landowners in their files, the Co-op did, they had everything. We were going to sell them everything. They even had all our books on Landowners and they sent them back to us later.

Q. What was the date of that deal in 1945?

A. That was prior to the loan, a few weeks prior to the loan.

Q. But that deal didn't go through, did it?

A. No.

Q. Now then, let's get down to this Landowners corre-
[fol. 1393] spondence.

A. But, sir, they sent the books back on the Landowners before the deal was turned down. I remember that very well.

Q. How would you reconcile or how do you reconcile the fact that Co-op got the Landowners, you say in 1945, and yet you say in 1947 Landowners, there was something about it that Co-op couldn't acquire?

A. I found that out, sir, from the 1945 on, that they could not keep—they did not want to keep the Landowners, sir. I found that out in 1945 and when we were trying to sell them the property I found out at that time just prior to the loan that they did not want the Landowners and somebody in my office—I don't remember who it was—wrote them and asked them if they were not interested in the Landowners property to send us the files back.

Q. But they did take it in 1945 you say?

A. They had it in 1945.

Q. All right. Now, let's stay with this. Now after the

deal with the Co-op, then Mr. Pielsticker wrote this Defendant's Exhibit L to Dale Ives, I understand. You know the letter I am referring to?

A. Yes, I have heard it referred to in this Courtroom.

Q. And in this letter Mr. Pielsticker says:

"Mr. W. H. Black has requested that I write you with reference to the matters of the Landowners Oil Association."

Then he goes on, that Mr. Black had given you the verbal promise that you all could participate in it?

A. Yes.

Q. And you had given your verbal promise?

A. I did, sir.

Q. At what time?

A. After I had bought it back, sir.

Q. After you had bought it back?

A. Yes, sir.

Q. And where was this that you gave your verbal promise?

A. When I was talking to Mr. Ives on the telephone, sir, and I am not sure how many times, whether it was once or twice or several times that we discussed it.

Q. What did you tell Mr. Ives?

A. I told him I would be very happy for his friends and himself or any other stockholder who had ever been, not only the ones who had sold their stock, but the ones that stayed in and liquidated at the finish, anybody that wanted to have that part in Landowners could have it, sir. Mr. [fol. 1394] Roos, I promised him part of it and he wanted to take part of it. Everybody I talked to I said they could participate in the Landowners.

Q. By the way, while we are on that subject, for the $50,000 00 or thereabouts that you paid for Landowners——

A. Yes, sir.

Q. You also, for that same consideration, bought from Black-Marshall an account receivable of fifty some thousand dollars, didn't you?

A. No.

Q. Do you want to say you did not?

A. I don't think I did. I don't see how I could.

Q. Well, I will come to that a little later. Now, going back to this letter. You further say, Mr. Pielsticker does in his letter, that Mr. Black desires to know whether you and your associates—well now, in this letter to Mr. Ives who did you understand your attorney was referring to by "your associates"?

A. Well, I meant his friends, the people that had always gone along with him or with him in the Aledo Oil Company or whatever they called it at that time. I don't know what you call it.

Q. That is right, you meant the old stockholders of Black-Marshall at Aledo, didn't you?

A. I meant that, yes, sir.

Q. Yes, sir. Now that first letter was addressed to Dale Ives?

A. Yes, sir.

Q. Then I notice that Mr. Pielsticker sends a second letter to Dale Ives, dated February 16, 1948, and he says that Mr. Black, when he was in Wichita, says that you talked to him over long distance and that you and your associates want to acquire between five and eight thousand shares of Landowners Association at $12.50 a share, and you figured that that was what Landowners was worth. did you?

A. Oh, no, I figured we needed it for development, sir.

Q. I beg your pardon?

A. They were going to participate in exactly the same basis I was in, sir.

Q. All right. What did you figure Landowners was worth at the time?

A. Well, I thought I was buying it for $40,000.00 but it cost me fifty-two.

Q. Now, I notice here that up-to-date, I want you to follow this, we haven't yet got any letter from Mr. Ives. Pielsticker wrote him on September 13, 1947, and he wrote him again February 16. 1948. Then I notice that Mr. Piel-[fol. 1395] sticker wrote him again on May 11, 1948. Then I notice that W. H. Black wrote him on May 13, 1948. You wrote that letter, didn't you, to Mr. Dale Ives, May 13, 1948—this is the letter?

A. Yes, I think—yes, I am sure I did.

Q. And among other things you say that you want to find out if Dale Ives and your crowd want to get in the venture, don't you?

A. Yes.

Q. You are writing to Mr. Ives. Now, let's find here the first and only letter that Dale Ives writes anybody.

A. He writes that to me, sir.

Q. Yes. Now let's see what Dale Ives wrote.

A. All right.

Q. I will ask you if Dale Ives didn't write to you on June 4, 1948, as follows:

"Mr. W. H. Black, LaJolla, California.

Dear Sir: Your letter received and I have been slow in answering, due to the fact, that I have been trying to get all parties interested in the old company in a meeting so that they could decide what they want to do with the Landowners Oil Association and I think it is now arranged for a meeting next week, so that after that I will be in a position to give you a definite answer in this matter.

I received a letter from Pielsticker in which he figured our part of the expenses in this matter at $10,000.00, but he did not state on what basis this was computed or on the number of shares he expected us to take in the new organization."

I believe this sentence doesn't have anything to do with it and I will come on down.

"If possible, I would like to have some sort of statement showing the present status of the old Landowners Oil Association regarding properties which have been top leased and also properties in litigation.

Trusting that you and your family are all well and happy, I remain,

Yours very truly,

DALE G. IVES."

[fol. 1396] Now then, up to June 4, 1948, you hadn't had any letter from Dale Ives about the matter, had you?

A. I don't think so, I don't remember. Mr. Pielsticker—I was in California—he was here, he had the company records here.

Q. Dale Ives writes you and says that he wants to know on what basis these shares are to be issued—no, he wants to know on what basis the 10,000 shares is to be computed and he says that he wants some sort of a statement about the status of this old company?

A. Well, sir, I think they wanted 8,000 shares.

Q. What I am coming to, you never answered his letter, did you?

A. I don't know whether I did or did not.

Q. You never answered it and you know, as a matter of fact, that your failure to answer the letter and give him that information that Ives never called a meeting of the stockholders?

A. I don't know that at all.

Q. Yes.

A. Mr. Pielsticker was handling it for me. I did not have any records. I couldn't tell him a thing about the suits or anything. Mr. Pielsticker was handling the whole thing for me and had all the records, the books and the stock and everything in his office.

Q. Well, this Defendant's Exhibit L appears to be all the correspondence between you and Pielsticker and Ives about the matter?

A. There could have been a lot of telephone conversations, sir.

Q. I understand there could have been but do you have any other letters now that bear on this matter except Ives' letter to you wanting information which you apparently did not answer?

A. No, I didn't even have those letters, sir.

Q. All right. You did get a letter from Dale Ives on November 2, 1948, or soon thereafter, in which he wrote you as follows:

"W. H. Black, LaJolla, California.

I am writing you regarding the money due the stockholders back here on the sale of Black-Marshall Oil Company. The fact that you and I have been at odds since you tried to wreck the new company we started does not enter into the settlement which is due all of the stockholders back here as per your promise when the company was sold. You

will recall that you were to take out all expenses of the [fol. 1397] sale and then the balance of the sale price was to be prorated among all the stockholders according to the amount of stock they owned in the company.

Under the agreement with the N.C.R.A. I know that there was not to be a settlement until June 30, 1949, but more than a year has now gone by and no large claims have been made, so I can see no reason why a small amount cannot be left in escrow and the balance paid to all of the original stockholders as agreed upon at the time of the sale.

Let me hear from you at once regarding the matter.

Yours very truly."

Did you ever answer that letter of his?

A. I never heard of that letter until in this Courtroom, sir.

Q. Well now, I notice a very interesting observation in this letter. In your letter that Mr. Pielsticker wrote he refers to an agreement that you had about the Landowners being kept out. Mr. Ives refers to the agreement at the same time that you were to take care of these old stockholders?

A. I never heard of that letter, sir. I never saw it and I don't believe it was ever mailed to me, sir.

Q. Let me ask you this: You did have a verbal agreement with Ives that these old stockholders were to be treated the same as the others, didn't you?

A. Every stockholder in the Landowners, yes. I mean every stockholder who participated in the Landowners, not only in his group, but every group.

Q. But you also, as a part of that verbal agreement, agreed that you were to take out the expenses of the sale and the balance of the sale price was to be pro-rated among those original stockholders?

A. There——

Q. I mean on the sale basis?

A. There was no expense of the sale and I agreed to nothing of the kind.

Q. Nothing of the kind?

A. I agreed to nothing of the kind.

Q. All right.

A. Had I of done that wouldn't I have wanted the other stockholders who sold for $51.06 to participate in that?

Q. Let me read you this letter to Mr. Ives which I think you do admit and you have introduced it in evidence. I [fol. 1398] guess it is the Plaintiff's Exhibit. It comes from your file. It is from Dale Ives to Mr. W. H. Black, 1311 Cave Street, LaJolla, California.

"Dear Bill: I am having some trouble with one of the stockholders over the sale to the Co-op, Herschell Blazer, who I told you would possibly be the only one we would have trouble with over the sale has employed Wieskirch who handled the commission suit of Pryor and Lockhart—"

Pardon me, I will read that again.

"Herschell Blazer, who I told you would possibly be the only one we would have trouble with over the sale has employed Wieskirch who handled the commission suit of Pryor and Lockhart, to sue the old company, to set aside the sale and for the full value of his stock as the same was sold to the Co-op.

I understand from a reliable source that Weiskirch has taken the suit on a commission basis and will try to get other stockholders to join but I don't believe that can be done as I have talked to them and have them satisfied, but a suit will sure make it embarrassing here to me with my local people and unjustly so, because I have not gained any more from the transaction than any of the other stockholders."

Now, let's pause there for just a moment. This letter was written on November 29, 1948. That was after your deal with Co-op, wasn't it?

A. 1948, yes, a year later.

Q. I notice that Mr. Ives—and by the way—he was present there when the deal was made, wasn't he?

A. The deal with Co-op?

Q. Yes.

A. Yes, sir.

Q. He refers to this as a sale to the Co-op?

A. Yes.

Q. He doesn't refer to it as a sale of stock, just a sale.

I further understand him to say here that he is having some trouble with Herschel Blazer but he thinks he can keep these other stockholders satisfied. Did he ever talk to you about how he was going to keep them satisfied?

A. He said they were all satisfied but Mr. Blazer.

[fol. 1399] Q. Did he tell you what he was telling them to keep them satisfied?

A. No, he did not.

Q. Did he tell you that he was telling them that if they would wait until, I think June 30, 1949, then they would get their money?

A. I have heard all these people testify to that but he never told me that.

Q. He never told you that, all right. Continuing with his letter:

"I am going to Wichita December 1st, for the annual meeting of our company at which time I will get in touch with Weiskirch and see if a settlement can be worked out because this is one matter that I want settled as it affects me more than anyone else. If the settlement can be arranged I am willing to pay more than my share in order to get it straightened out, otherwise, I will be the goat.

Should we settle this matter we will have no further trouble with stockholders as the rest are satisfied and are not going along with Blazer.

Please let me know what your attitude is toward settlement of this suit.

With kindest personal regards,

DALE."

Now then, will you look in your correspondence and let us have your answer to this letter. That is the one Mr. Ives writes you?

A. I don't know whether I have an answer to it or not.

Q. Will you make a search?

A. Sir, I kept no file on this. I mean I kept no files on any of this stuff.

Q. Mr. Black, your attorneys read some fifty letters.

A. They dug them all out themselves. I didn't have them.

Colonel Walker: Do you have, Mr. Sief....., the answer that Mr. Black sent to that letter?

Mr. Siefkin: We do not.

Q. Do you know whether you did reply to it or not?
A. I don't know whether I did or not.

* * * * * * *

[fol. 1404]

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Q. All right. When did you start dickering with the Co-op on the deal that finally resulted in the seven and one-half million dollar deal?

Mr. Siefkin: Your Honor, I object to that as repetition. We have gone over that at least three times and I object to it unless there is some new matter.

The Court: I don't remember this.

A. When did we start?

Q. Yes. I first asked you about the million dollar loan and then I have asked you about the three million and two, and now I am asking you when did you start the deal with the Co-op that resulted in the seven and a half million dollar transaction?

A. I would have to have something to refresh my memory. I couldn't tell you.

Q. All right, let's see if we can refresh it.

A. All right, sir.

Q. On July 17, 1944, do you remember that Mr. Hightower, Vice-President of the bank at Oklahoma City, said that you had agreed to sell your properties to the Standard Oil for three million four hundred thousand; do you remember that deal?

A. I remember we tried to sell it to them.

Q. And it fell through, didn't it?

A. Yes.

Q. Do you remember in October, 1944, Mr. Bowling over at Lindsborg, Kansas, wanted to buy five or six million dollars of your production?

A. Mr. who?

Q. Mr. Bowling, R. W. Bowling, wrote you?

A. I don't remember it. He possibly did.

Q. Do you remember that you took Mr. Hatcher to New

York in order to help finance the drilling of a hundred wells in 1946?

A. To New York?

Q. Yes, sir, in order that you could talk with the Co-op about financing a hundred wells?

A. The Co-op was not in New York, sir.

Q. I know they weren't but in your correspondence file there is some correspondence about your going to New [fol. 1405] York. You possibly came through Washington?

A. We went to Washington. I think when we finished there we went on to New York.

Q. All right. Was that in connection with getting more production and carrying on your deal with the Co-op?

A. What was the date of that?

Q. That trip to New York was in June, 1946.

A. Oh, no, that was on another matter.

Q. That was on another matter?

A. Yes, we were trying to build a pipeline.

Q. All right. Do you remember that in connection with this matter the testimony of Mr. Cave here the other day——

A. Yes.

Q. You heard Mr. Cave say that as far as the Co-op was concerned what they wanted was to get your producing properties, they wanted the oil?

A. Yes, sir.

Q. And that was correct, wasn't it?

A. That is correct.

Q. And all the other was simply a matter of what formality you would go through to transfer to them the assets, wasn't it?

A. I don't know whether it is more than a formality or not. I would say it is more than a formality, sir.

Q. Well, you did contemplate that in the end Co-op would have all of the stock?

A. That, I think, is correct. They would have the stock or the properties or something. I don't know why they would buy it if they didn't.

Q. And if it hadn't been for the tax angle about it why

you would have gone right ahead and made a straight deed or bill of sale for the seven and a half million; that is right, isn't it?

A. I can't see any difference in it, only from a tax standpoint.

Q. In substance, you were transferring your assets to them but in order to try and carry out the instructions of the tax men you went through the form of selling stock. Now that is the main thing boiled down, isn't it?

A. Could be, sir, I am not an expert. I am not an attorney and I wouldn't know how to answer it.

Q. Well, in addition to that, do you remember that on June 18, 1947, you wrote to Virgil O. King at Oklahoma City. Who is Mr. King, by the way, Virgil O. King?

A. I believe he is a geologist, sir.

[fol. 1406] Q. June 18, 1947, was getting right up close to the date of the consummation, was it?

A. Yes.

Q. Do you remember that you wrote him that you were in the process of transferring your company to the new purchaser?

A. Yes, sir.

Q. Do you remember on June 23, 1947, you wrote a letter to a man by the name of Blevins in New Orleans?

A. Yes.

Q. Who is Mr. Blevins?

A. He was a friend of Mr. Roos and mine.

Q. Do you remember you wrote to Mr. Blevins in New Orleans on June 23, 1947, "We are selling the Black-Marshall Company—"

A. All right.

* * * * * * *

[fol. 1420]

* * * * * * *

Q. Now, one further thing that we discussed yesterday, Mr. Black. Do you recall that I spent some time asking you about how the stock was handled that came in from Aledo in 1944? In order that the Court may and Counsel here may,

we understand of course that in 1944 there was some 25,000 [fol. 1421] shares of Aledo stock went to Gill and Roos and Kincade, so I am laying that aside. But as to a great deal of the other stock that came from Aledo in 1944, do you recall I was asking you yesterday if you wouldn't get in a certificate, say, for 250 shares and say from one John Bowers, as an example, and then you would immediately make out two certificates for 125 shares each right back to John Bowers. Do you recall the matter that we discussed at some length?

A. Yes, I do.

Q. And I think that you left the inference, perhaps I had picked out just an isolated transaction, I think you probably left the inference that I had perhaps picked out just an isolated transaction. Now in order to clarify that matter a little more, I wish you would now look at Common Stock Certificate Number 271. Is it not a fact that Certificate Number 271 was for 250 shares of common stock and issued to John S. Bowers?

A. Yes, sir.

Q. He lived at Aledo, did he not?

A. I don't know, sir.

Q. Now you look at that certificate. It was endorsed in blank, was it not?

A. Yes.

Q. What is the date of that endorsement?

A. November 13, 1943.

Q. Will you return now to stock Certificate Number 362?

A. Yes, sir.

Q. Don't you find that John S. Bowers originally had 250 shares of stock, was issued 125 shares on Certificate 362?

A. That is right.

Q. Now then look at Certificate Number 378 and see if he wasn't also issued another 125 shares?

A. Yes, sir.

Q. So it does appear that John S. Bowers sent in 250 shares in 1944 on Certificate Number 271 and was issued 125 shares on Certificate Number 362 and 125 shares on Certificate Number 378, is that not correct?

A. That is correct.

Q. Very well. Let's go to another one.

A. May I tell you that these are not original issues, so there may be some reason for that that I can't explain, sir.

Q. Very well.

A. These are transferred from Mr. Berglund.

[fol. 1422] Q. Now let's look at Certificate Number 17.

A. Number 17.

Q. Is that not for 75 shares to Dorothea Britton?

A. I am sorry, sir, I had the preferred list here.

Q. Will you look at the common record, please? Have you found it?

A. Yes, sir, I have.

Q. Is it not a fact that Certificate Number 17 was one of the original issues of stock?

A. Yes, sir.

Q. Is it not a fact that Certificate Number 17 was originally for 75 shares of stock to Dorothea Britton?

A. Yes, sir.

Q. Now will you turn to Certificate Number 356?

A. Yes, sir.

Q. Is it not a fact that that Certificate 356 was for 38 shares?

A. Yes, sir.

Q. Now look at Certificate Number 379. Is it not a fact that Certificate Number 379 is for 37 shares?

A. Yes, sir.

Q. In other words, you find that that original Certificate Number 17 for 75 shares to Dorothea Britton in 1944 was turned in and she was issued Certificate Number 357 for 38 or Certificate Number 379 for 37 shares?

A. No, sir, that was in 1945.

Q. That is when it was re-issued to her?

A. Yes, sir.

Q. That is right. What I am getting at, your 38 and your 37 shares make up the 75 shares she turned in?

A. Yes, but this was in 1945, sir.

Q. I understand.

A. I can't explain that.

Q. I am following up now the way this was split up. And both the 38 shares and the 37 shares Certificate were made to Dorothea Britton, weren't they?

A. Yes, sir.

Q. And I will hand you this in just a moment and I want you to state if it isn't a fact that both certificates 356 and 379, issued to Dorothea Britton, were both issued on the 20th of March, 1945?

A. Yes, I think that is right.

Q. Let's look now at Certificate Number 16, being part of the original issue of stock.

Mr. Siefkin: I wonder if I can help any in shortening this. Do you want to ask questions following this? I will agree that that is what the books show.

Colonel Walker: Very well.

[fol. 1423] Mr. Siefkin: There isn't any question about it. It is a matter of original record, whatever the record shows, they are all original.

Colonel Walker: Let me read into the record here and perhaps we can stipulate on it. Mr. Siefkin, let's see if we can stipulate and agree that Certificates Numbers 16—you might want to look there and follow me——

Mr. Siefkin: No, if you are taking it down as a matter of record, I am perfectly willing to stipulate any way that you want.

Colonel Walker: All right. That Certificate Number 16 was originally issued for 75 shares to Donald C. Clark of Aledo, that that stock was turned in in 1944 and thereafter there was issued to Donald C. Clark a new certificate, 354, for 38 shares and Certificate 382 for 37 shares.

Mr. Siefkin: Now you have a tabulation there, Mr. Walker. Can't we just mark that and introduce it if you want to use it as an exhibit? I take it that is the auditor's work, isn't it?

Colonel Walker: It is.

Mr. Siefkin: I have no objection to it.

Colonel Walker: Well, I can stipulate, I have only got four more items, and I asked the auditor to make me a sample of this.

Mr. Siefkin: All right. I think that is true—I wouldn't say it positively—but I think that is true of all the 11,714 shares, isn't it?

Colonel Walker: That is right. It is my understanding

and I made the assertion yesterday and I don't want to be making statements before the Court or a witness——

Q. This stock in 1944, speaking of the 11,714 shares, would come in, say, for example, this John S. Bowers that we have been over, send in a 250 shares certificate and then two certificates would be made out for 125 shares. Naturally, if it was for 75 shares, one of them had to be for 38 and one for 37?

A. I am sorry, sir, I can't remember the date here, but I think at the time they were divided I think we had the full [fol. 1424] certificate, sir, up until the time the distribution was made of the half of the stock.

Q. My purpose in taking the time this morning is this: Yesterday you left the inference that I just picked out an isolated transaction and wasn't representing a trend. I kept using the word "trend" you will remember?

A. Yes.

Q. Now I am coming back and asking you this morning don't you find that that was the trend of this 11,714 shares?

A. It could have very easily been, sir.

Q. And, as a matter of fact, it was from what we are finding now?

A. It looks like it, yes.

Q. All right. Now then that the record may show, this will be very short, that Dale G. Ives was issued the original issue on Certificate Number 4 for 10,000 shares, that he sent that in in 1944 and was re-issued Certificate 346 for 5,000 shares and Certificate Number 384 for 5,000; that Mabel'e Lundblad was issued Certificate Number 181 for 250 shares. It was sent in in 1944. She was re-issued on Certificate Number 353 125 shares and Certificate Number 385 125 shares; that Annabelle McClanahan was issued on Certificate Number 229 50 shares, she sent it in in 1944, and there was issued to her Certificate Number 358 for 25 shares, Certificate Number 387 for 25 shares; that Ricka Rogers was issued Certificate Number 230 for 50 shares and sent it in in 1944 and was re-issued Certificate Number 357 for 25 shares, Certificate Number 390 for 25 shares; that Emma Stevenson was issued Certificate Number 228 for 150 shares and sent it in in 1944 and was issued Certificate Number 358 for 75 shares and Certificate Number 392 for 75 shares.

Mr. Siefkin: Do you want me to agree to that?

Colonel Walker: If you will, please.

Mr. Siefkin: I will agree to that and I will say further to that I think that is true. There might be an exception of a few shares. I think it is true with the entire 11,714 shares.

Colonel Walker: Thank you.

Q. Now do you recall that in 1944-1945 when Ives [fol. 1425] brought in this stock, that you told him if the deal didn't go through that you would return that stock?

A. I don't remember any such conversation, sir.

Q. Did you ever tell Mr. Ives that in 1947, that if the deal didn't go through you would return his stock?

A. I certainly did not, sir.

Q. You certainly did not?

A. No, I didn't.

Q. I would like to call your attention then, sir, to Plaintiff's Exhibit Number two hundred and either seventy-five or ninety—Number 275, being your letter in your handwriting to Mr. Dale Ives. It is dated March 28, 1947. I will read you the entire letter so that I won't be misquoting.

"Dear Dale: I have been giving a lot of consideration to the thought of selling out lock, stock and barrel, as we are just about out of locations to drill, and then we will be in such a high tax bracket that we would be depleting our reserves so fast that we would be out of business in a short time.

"Our estimated tax for this year is around a half million dollars, and we owe three and a half million, so I can't see how we can pay off the obligations, the taxes and come out with anything. I believe I could work out a deal with one of the companies to pay us $25.00 per share for our stock and they assume the obligations.

"I don't know what Mr. Roos will do about this kind of a deal but we will have to deliver enough of the stock and let the purchaser liquidate the company should he not choose to join us.

I'm enclosing a copy of our statement for the first six months of our fiscal year. You will notice that our book

value is $8.10 per share and that is about what it would liquidate for in my opinion. Arthur Kincade agrees this would be an excellent time to make a deal and has sent me his stock." Here is the part that you asked about and you denied a moment ago.

"Should you agree I wish you would do likewise and I will proceed as fast as possible. Should I be unable to work it out in sixty days I of course will return your stock."

[fol. 1426] A. That is the 3,000 shares.

Q. Didn't I ask you a moment ago——

A. Yes, but I thought you meant the stock he had already sold, sir. It is a very difficult question. I mean to me, it seemed like you were trying to make me say that I told him I would send back his original stock, which I never did, sir. The stock you are referring to is his last 3,000 shares that he sent in.

Q. I asked you, Mr. Black, if you ever told Mr. Ives in 1947 that if you didn't make a deal you would send back Mr. Ives' stock and you denied it?

A. The stock that hadn't been sold. I can't follow you on that kind of a question, sir.

Q. Well, did you intend, if your 1947 deal fell down, to return Ives' stock or keep it?

A. His 3,000 shares, of course, I did. He hadn't sold it. We were trying to sell the stock to the Co-op.

Q. And wasn't that the same agreement and situation you had had in 1944 and 1945 with the Aledo people?

A. It certainly was not, sir.

Q. And that wasn't the reason you split those shares up into two parts?

A. Had nothing to do with it, sir.

Q. What was the reason for splitting them into two parts?

A. Because they were selling half of it, sir.

Q. And that is your explanation of why you made it out in both parts, both halves about the same——

A. I couldn't tell you to save my life why it was made that way, sir, I was not the accountant or the bookkeeper and I couldn't possibly tell you why that was done.

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[fol. 1466]

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Redirect examination.

By Mr. Miller:

Q. Mr. Black, would you tell the Court when you got acquainted with the Aledo group of stockholders? Now, I don't mean by that Mr. Ives or Mr. Boyd, which you have already told us about, but the remaining members of that group?

A. Well, sir, I knew some of them about the time I met [fol. 1467] Mr. Boyd, Doctor Boyd, and Mr. Ives. I think I met the rest of them late in 1939 or early 1940.

Q. Where did you meet them?

A. Some of them in Aledo, some of them in Wichita, and some of them at the first organization meeting in Aledo.

Q. That was in January, 1940?

A. Yes, sir.

Q. Mr. Black, do you recall specifically any of them that you met out here in Kansas in the fall of 1939?

A. I am quite sure Mr. Berglund, and I think Doctor Wadleigh and Mr. Riley, I can't recall all the names, sir.

Q. Now the organization meeting for the Black-Marshall Company was in 1940?

A. Yes, sir.

Q. And you had the first stockholders' meeting thereafter which was in 1941. Is that the one held back in the Green Lantern?

A. Yes, in the little restaurant, yes.

Q. Now the next two meetings, the 1942 meeting and the 1943 meeting, they were held here in Wichita or in Great Bend, were they not?

A. Yes. I believe Wichita was the first one and I believe the second one was in Great Bend.

Q. Was there any reason, Mr. Black, why they were held here?

A. I think, if I remember correctly, that most of them wanted to come out and see the properties. At least that is the inference that I had. I am not quite sure that was it.

Q. Do you have any recollection of how many stockholders attended the 1942 meeting?

A. No, sir, I don't. Quite a few but I couldn't tell you how many.

Q. Do you have any recollection of which ones they were?

A. I couldn't tell you that, sir.

Q. Do you have any more recollection about the 1943 meeting?

A. No, I wouldn't try to say who they were. There were quite a number of them of course but I couldn't tell you.

Q. Of the Aledo group?

A. Yes, sir.

Q. Now after the $3,200,000.00 loan, which was in the fall of 1945, around October, was it not?

A. Yes, sir.

Q. Did you see any of the Aledo group thereafter?

A. Yes.

Q. Where and when?

A. Well, I think we saw them in Great Bend. I know [fol. 1468] we saw some of them, how many, I can't say, sir.

Q. Well now, did they come out to Great Bend to see you or do you know what they were there for?

A. Well, I think they were there on this new venture they were in. I think practically all of them came up to the office and I believe that a few of them went out to the field with us or some of the members of our organization.

Mr. Barash: I object to this and move to strike it unless he specifies whom he is talking about.

Mr. Miller: That was my next question.

The Court: All right.

Q. Mr. Black, will you tell us, to the best of your recollection, what stockholders——

A. The only one that I am definitely sure of that I could put my hand on, I mean right at this moment, and I could say the only one that I am positively sure of was Mr. Sherrard and Doctor Wadleigh. There were others but I wouldn't try to remember who they were.

Q. Well now, this other venture. Did you mean Dale Ives' interests?

A. Yes.

Q. Now the Aledo Oil and Gas Company?

A. I think it is the Aledo Oil and Gas now, yes, sir.

Q. Now you have been asked about the Petroleum Investment Company and have been shown their agreement?

A. Yes, sir.

Q. Which you signed?

A. Yes, sir.

Q. Do you know, Mr. Black, who wrote that agreement?

A. Yes, Mr. Ives, Mr. Dale Ives.

Q. Now those agreements were written and signed by you when?

A. Well, I think two or three different times, sir. I would sign them in blank and leave them with Mr. Ives.

Q. About what year?

A. I know in 1938—I don't believe there were any in 1939. But I am quite sure during the year of 1938.

Q. Where was that operation carried on?

A. In Illinois, and one well in Indiana, I believe.

Q. Do you have any present recollection as to approxi-[fol. 1469] mately how much money you got from that group?

A. To the best of my recollection there was something like twenty or twenty-one thousand dollars.

Q. What did you do with that money, Mr. Black?

Colonel Walker: To which we object as the written accounting is in evidence.

Mr. Miller: I think it is not in evidence, if Your Honor please. I think that he is referring to this 1939 thing which has to do with Kansas operations, and I am asking him about what happened to the money received and used back in Illinois, what he did with it.

The Court: Overruled. He may answer.

A. Yes, sir, we drilled seven dry holes in Illinois.

Q. Mr. Black, do you know how much it cost to drill wells in Illinois in that period?

A. Yes, they were cheaper then. I mean just the cutting of the hole would run from eight to twelve thousand dollars. It was according to the location in which you were drilling in.

Q. Would you explain to the Court how you were able to drill seven dry holes on twenty thousand dollars, approximately?

A. Yes, sir. We got dry hole contributions. We traded leases with drillers for partial payment and we made every

kind of a deal and transaction that was possible to make to spend as little money as we possibly could on those wells.

Q. Now I think you have told Counsel that you came away from Illinois, and were going toward California——

A. Yes, sir.

Q. —in the spring of 1939?

A. Yes, sir.

Q. At that time did you have any remaining funds from the money received through these Petroleum Investment Company agreements?

A. No, sir. We had spent all the money that we had on the Petroleum Investment Company.

Q. And do you recall when you again got funds from Aledo, from anyone?

A. Yes. When I was in Tulsa Mr. Ives sent me either $600.00 or $1200.00, I am not sure which, either Mr. Ives or Mr. Boyd. Dr. Boyd was down there with me and I don't remember whether, while I was in the hospital Doctor Boyd was down there—and I don't remember whether [fol. 1470] he sent me the $1200.00 or whether Mr. Ives sen me $1200.00.

Q. Now do you know about when that was?

A. Well, I believe it was in May of 1939.

Q. Now thereafter did you get funds from Aledo through any source?

A. Yes. I got some funds from Aledo after the Esfeld oil well was drilled, I think in October or November I believe I got some money from them. It was between May and October. I don't believe that I got any money from Aledo, maybe with the exception of $450.00 that Doctor Rogers and some other person there owed me $200.00, and I don't recall the name at this time——

Q. Now Counsel has also asked you and shown you, I think it is Exhibit 62, which is a proposal made to the group comprising the Landowners Oil Association?

A. Yes, sir.

Q. Back before the stock trade and before the incorporation of the Black-Marshall Oil Company?

A. Yes, sir.

Q. Mr. Black, do you know who prepared that proposal?

A. On the trade?

Q. That is right.

A. I believe it was Mr. P. K. Smith, I believe it was.

Q. Did Mr. Smith represent you?

A. Yes, sir.

Q. As your attorney and did Mr. Smith, at your direction take any steps toward procuring any funds for you after you came out here to Kansas?

A. Yes, sir.

Q. Do you know when that was?

A. That was in the fall of 1939. I couldn't tell you the exact date. It was either, I think it was in November or possibly December. It was in the fall, I am quite sure, because I didn't get here until September.

Q. I will hand you what the Clerk has just marked for identification as Defendant's Exhibit T-3. Will you look at it, please, and identify it for us, if you can?

A. I remember that letter but the detail in it, of course, I don't remember. I remember having him write. I knew this Kiger and Dilsaver in Mattoon. They represented me when I was in Mattoon.

Q. Now did Mr. P. K. Smith write this letter on your behalf?

A. Yes, sir.

Q. What was the purpose?

[fol. 1471] A. The purpose was to get a settlement from Mr. Garland of the Damon Corporation.

Q. For what?

A. For my half interest in the leases that we owned jointly in Illinois that were in his corporation's name.

Q. When did you acquire your interest in those leases?

A. Well, after this letter I got the assignment but we acquired the interest in January, I believe, of 1937.

Mr. Miller: I want to offer it, if Your Honor please, but Counsel is looking at it now.

Q. I will hand you now what the Clerk has marked as Defendant's Exhibit U-3, and ask you to examine the document, if you will, and identify it for us if you can.

A. Yes, I remember that now. I had forgotten about this.

Q. Can you identify it for us?

A. Yes. That is to receive a partial payment, payment of $10,000.00 in cash, and $25,000.00 oil payment out of a $60,000.00 oil payment that Mr. Garland had on some leases that we had sold, plus some additional leases that we were going to divide fifty-fifty, and I think a division was made. Why, he would pick one and I would pick the other lease. I think that covers it, sir.

Q. Now, Mr. Black, did you receive the $10,000.00?

A. Yes, sir.

Q. I will hand you what the Clerk has just marked for identification as Defendant's Exhibit V-3 and ask you to examine the documents and identify them for us, please?

A. Yes.

Q. Is that the $10,000 payment, acknowledging receipt of it?

A. Yes, that is the $10,000.00 payment.

Q. I will also hand you what the Clerk has just marked for identification as Defendant's Exhibit W-3 and ask you to identify those documents for us, please?

A. That is my account in the Fourth National Bank, sir.

Q. For what period?

A. It is from October, 1939 to January 31st.

Q. It is 1940, isn't it?

A. Yes, January, 1940, that is correct.

Q. Can you identify any of the items on it, Mr. Black, any of the deposits?

A. Well, the only two that I am absolutely sure of is the [fol.1472] $10,000.00 deposit in the Southland Royalty Company and the Southland Royalty Department of forty-six hundred and something.

Q. That $10,000.00 deposit of December 23, which the telegrams tell you about?

A. Yes, sir, that is which the telegrams tell you about.

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[fol. 1510] PLAINTIFF'S EXHIBIT 1.

[Certified Copy.]

In The District Court of the United States for The Southern District of Illinois, Northern Division. A. M. Amen, Plaintiff, vs. Black-Marshall Oil Company, et al, Defendants. Civil No. P-1094.

Order.

This cause having come on to be heard on plaintiff's verified complaint and motion for appointment of a receiver, upon notice by registered mail to all parties of record who have been served herein and to the Secretary of State of the State of Illinois, and the Court having considered said complaint and motion and the deposition of certain parties in interest and argument of counsel and now being fully advised in the premises, Doth Find:

That certain causes of action in which claims are asserted on behalf of Black-Marshall Oil Company by certain shareholders or former shareholders of said company are now pending in the States of Kansas, California, New York and Illinois; that said Black-Marshall Oil Company and its subsidiaries did business and carried on corporate activities in the State of Kansas and owned or were interested in properties located in that State and in the States of Oklahoma and Texas; that its books and records are situated in the State of Kansas, and a number of the principal defendants in the causes of action above mentioned are resident in or have been personally served with process in the State of Kansas.

And it further appearing to the Court and the Court so finds that the appointment of a receiver is necessary to collect and marshall the assets of said Black-Marshall Oil Company and to protect and preserve the rights of plaintiff and those of other shareholders of Black-Marshall Oil Company and that it will be for the best interests of the plaintiff and other persons similarly situated if such receiver is appointed,

It Is Therefore Ordered:

1. That D. Arthur Walker, Arkansas City, Kansas, and Fred Windish, Galesburg, Illinois, be and they hereby are [fol. 1511] appointed co-receivers of the defendant, Black-Marshall Oil Company, and of all the properties and rights of said defendant, real and personal, of whatever kind and description and wherever situated.

2. That each receiver shall forthwith execute and file in the office of the Clerk of this court a good and sufficient bond in the amount of Twenty-five Hundred.....Dollars ($2500.00) for the benefit of whom it may concern, conditioned to the effect that they will well and truly perform the duties of their office and duly account for all moneys and properties which may come into their hands as such receivers and abide by and perform all things which they shall be directed by the Court to do; said receivers shall promptly file a report with the Court whenever the moneys and properties in their hands as receivers exceed Five Thousand and no/100.....Dollars ($5,000.00); and the Court reserves jurisdiction to increase the bond of said receivers by any further order;

3. That until further order of the Court said receivers be, and they hereby are authorized forthwith to take and have complete and exclusive possession, control and custody of all the assets and property of the Black-Marshall Oil Company;

4. That said receivers be, and they hereby are, authorized and directed to prosecute and defend, intervene in or become a party to pending suits and actions, whether at law or in equity, and whether in State or Federal Courts, and to initiate further proceedings, in the States of Kansas, Oklahoma, Texas, California, and elsewhere as this Court may direct or authorize, and as the receivers may deem necessary or proper for the collection, protection, and distribution of the assets of the defendant Black-Marshall Oil Company or its subsidiaries, and for the collection and liquidation of any claims, rights, or causes of action that may exist as between shareholders or former shareholders of said corporation, and the carrying out of the terms of

this order, and to take all steps that may be necessary or proper in this regard;

5. That all assets so reduced to the possession, control and custody of said receivers shall be promptly reported to this Court together with all facts and circumstances that [fol. 1512] have come to the receivers' attention that may bear upon the proper disposition and distribution of such assets, to abide the further order of this Court.

6. That the Dissolution of Black-Marshall Oil Company on or about June 30, 1947 be, and it hereby is, set aside, rescinded and for all purposes adjudged a nullity pending determination of this action and the further order of this Court, and the Clerk of the Court is directed forthwith to send a copy of this order to the Secretary of State of the State of Illinois, and said receivers are authorized and directed to take all action that may be necessary or proper in this regard;

7. That said Black-Marshall Oil Company, the officers, directors, agents, attorneys and employees of said Company, and all persons claiming to act by virtue of or under said Company, and all other persons, firms and corporations whatsoever and wheresoever located, situated or domicile be, and they hereby are, restrained and enjoined from interfering in any manner to prevent the discharge by said receivers of their duties under the orders of the Court;

8. The Court hereby reserves jurisdiction to make, from time to time, such further orders, amplifying, extending, limiting, or otherwise modifying or changing this order and granting such further authorizations and directions to said receivers as to it may at any time seem desirable.

Enter; October 18, 1949.

/s/ J. LEROY ADAIR,
United States District Judge.

Filed October 18, 1949.

PLAINTIFF'S EXHIBIT 2.

Certificate Number 25687
State of Illinois
Office of
The Secretary of State

To all to Whom These Presents Shall Come, Greeting:

I, EDWARD J. BARRETT, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true photostatic copy of the Articles of In- [fol. 1513] corporation, including the Statement of Intent to Dissolve and the final Articles of Dissolution filed by Black-Marshall Oil Company.

The original of which is now on file and a matter of record in this office.

In Testimony Whereof, Thereto set my hand and cause to be affixed the Great Seal of the State of Illinois.

Done at the City of Springfield this 21st day of June A.D. 1949.

(Seal)

Secretary of State.

Certificate Number 24624

State of Illinois
Office of
The Secretary of State

To All to Whom These Presents Shall Come, Greeting:

Whereas, Articles of Incorporation duly signed and verified of Black-Marshall Oil Company, have been filed in the Office of the Secretary of State on the 3rd day of January A.D. 1940, as provided by "The Business Corporation Act" of Illinois, in force July 13, A.D. 1933.

Now Therefore, I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate of incorporation and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, Done at the City of Springfield this 3rd day of January A.D. 1940 and of the Independence of the United States the one hundred and 64th.

(Seal)

EDWARD J. HUGHES,
Secretary of State.

[fol. 1514] Form B

Before attempting to execute these blanks be sure to read carefully the instructions on the Back thereof.

(These Articles Must Be Filed In Duplicate.)

Paid Jan. 3, 1940.
I. F. $127.50.
F. T. $191.25.
F. F. $20.—
W O S

State of Illinois, Mercer County, ss.

To Edward J. Hughes, Secretary of State:

We, the undersigned,

Name Number Street Address City State

William H. Black, Fort Armstrong Hotel, Rock Island, Illinois.

Earl D. Boyd, 702 S. Maple Street, Aledo, Illinois.

Dale G. Ives, 603 S. Maple Street, Aledo, Illinois.

Myrtle Lundblad, 503 E. 8th Street, Aledo, Illinois.

Thornton N. Danford East Eighth Street, Aledo, Illinois.

being natural persons of the age of twenty-one years or more and subscribers to the shares of the corporation to be organized pursuant hereto, for the purpose of forming a corporation under "The Business Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

Received payment; page line, 004 Jan. 3 '40 26.

Article One

The name of the corporation is: Black-Marshall Oil Company.

EDWARD J. HUGHES,
Secy. of State.

Article Two

The address of its initial registered office in the State of Illinois is: 202 Stevenson Annex (Street), in the City of [fol. 1515] Aledo, County of Mercer and the name of its initial Registered Agent at said address is: Dale G. Ives.

Article Three

The duration of the corporation is: 99 years.

Article Four

The purpose or purposes for which the corporation is organized are:

To mine for, produce, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto.

To acquire by purchase or lease or otherwise lands in the oil fields of Illinois, or any other locality in Illinois, or in any other State or States of United States of America, for the purpose of prospecting for, and obtaining oil, gas, or other minerals; and to that end to drill, or cause to be drilled, oil wells or sink shafts for mining, and to buy, lease or otherwise acquire drilling rigs or other machinery or apparatus necessary to fully accomplish said purposes; and if oil or other minerals are found, then to market same to the best advantage.

To build, construct, lease, purchase or otherwise acquire buildings, machinery and other apparatus for refining, manufacturing or otherwise working up the products of mineral lands, either produced by this corporation or other persons or corporations and to refine, manufacture or otherwise work up the by-products of said minerals and to oper-

ate the said plant and market the products or by-products as manufactured to the best advantage.

To carry on such other business pertaining to oil, gas or other minerals as may be found necessary or desirable or such as is generally engaged in by corporations of this kind.

Article Five.

Paragraph 1: The aggregate number of shares which the corporation is authorized to issue is 220,000 divided into two classes. The designation of each class, the num- [fol. 1516] ber of shares of each class, and the par value, if any, of the shares of each class, or a statement that the shares of any class are without par value, are as follows:

Class	Series (If any)	Number of Shares	Par value per share or statement that shares are without par value
Preferred shares		20,000	Par value per share $10.00
Common shares		200,000	Shares are without par value

Paragraph 2: The preferences, qualifications, limitations, restrictions and the special or relative rights in respect of the shares of each class are:

Corporation shall have the right to redeem all of any one series, or all of all series of Preferred shares of stock upon giving 60 days notice in writing of intention so to do, at $11.00 per *shares,*

Preferred shares may be converted into Common shares at the ratio of one share of Preferred stock for two shares of Common Stock at any time prior to January 1st, 1945.

Preferred shares of stock are to receive a fixed dividend of 60c per share per calendar year, and no more.

Preferred shares of stock shall be entitled to cumulative dividends.

Preferred shares of stock shall have the preference over shares of Common stock in the payment of dividends.

Preferred shares of stock shall be paid in full out of the assets of the corporation upon the voluntary or involuntary liquidation of the corporation before any payment is

made out of the assets of said corporation on the Common shares of stock.

Each outstanding share of Preferred stock shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders.

Each outstanding share of Common stock shall be entitled to one vote in each matter submitted to a vote at a meeting of shareholders.

In case all of the shares are not called, those called shall [fol. 1517] be selected by lot as may be determined by the Board of Directors.

Article Six.

The class and number of shares to be issued by the corporation before it shall commence business and the consideration (expressed in dollars) to be received by the corporation therefor, are:

Class of shares	Number of shares	Consideration to be received therefor,
Preferred stock	10,500	$105,000.00
Common stock	75,000	$150,000.00
		$
		$
		$
		$
		$

Article Seven.

The number of directors to be elected at the first meeting of the shareholders is: five

Article Eight.

Paragraph 1: It is estimated that the value of all property to be owned by the corporation for the following year, wherever located will be $750,000.00.

Paragraph 2: It is estimated that the value of the property to be located within the State of Illinois during the following year will be $25,000.00.

Paragraph 3: It is estimated that the gross amount of business which will be transacted by the corporation during the following year will be $500,000.00.

Paragraph 4: It is estimated that the gross amount of business which will be transacted at or from places of business in the State of Illinois during the following year will be $100,000.00.

WILLIAM H. BLACK,
EARL D. BOYD,
DALE G. IVES,
MYRTLE LUNDBLAD,
THORNTON N. DANFORD,
Incorporators.

[fol. 1518] Oath and Acknowledgment.

State of Illinois, Mercer County, ss.

I, H. R. Morgan, a Notary Public do hereby certify that on the 3rd day of January, 1940, William H. Black, Earl D. Boyd, Dale G. Ives, Myrtle Lundblad and Thornton N. Danford personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

In Witness Whereof, I have hereunto set my hand and seal the day and year above written.

H. R. MORGAN,
Notary Public.

Form B.

Box..... File.....

Articles of Incorporation.

—of—

Black-Marshall Oil Company.

Filed Jan. 3, 1940.

EDWARD J. HUGHES,
Secretary of State.

Box 2643, No. 209671.

Articles of Incorporation

of

Black-Marshall Oil Company.

Aledo.

Number of Authorized Shares 20,000 PV, 200,000 NPV. Duration 99 years.

Filed Jan. 3, 1940.

EDWARD J. HUGHES,
Sec'y. of State.

[fol. 1519] Form E.

Date Paid 6-28-47
Filing Fee $1,
Clerk WEL

(To be filed in duplicate.)

Statement of Intent to Dissolve by Voluntary Action of the Corporation Pursuant to Section 76 of "The Business Corporation Act"

of

Black-Marshall Oil Company.

963 50

Paid June 28, 1947.

EDWARD J. BARRETT,
Secretary of State.

To Edward J. Barrett, Secretary of State, Springfield, Illinois.

The undersigned corporation, for the purpose of dissolving the corporation, and pursuant to the provisions of Section 76 of "The Business Corporation Act" of the State of Illinois, hereby executes the following statement of intent to dissolve:

Article 1. The name of the corporation is Black-Marshall Oil Company.

Article 2. The names and respective addresses, including street and number, if any, of its officers are:

Name	Number	Street	City	State
W. H. Black,	c/o	Zarah Hotel,	Great Bend,	Kansas.
Leon F. Huff,	1223	Monroe Street,	Great Bend,	Kansas.
Dale G. Ives,	702	South College Ave.,	Aledo,	Illinois.

Article 3. The names and respective addresses, including street and number, if any, of its directors are:

Name	Number	Street	City	State
W. H. Black,	c/o	Zarah Hotel,	Great Bend,	Kansas.
Leon H. Huff,	1223	Monroe Street,	Great Bend,	Kansas.
Dale G. Ives,	702	South College Ave.,	Aledo,	Illinois.

Article 4. A copy of the resolution of the shareholders [fol. 1520] authorizing the voluntary dissolution of the corporation is as follows:

"Resolved that this corporation be dissolved and the proper officers of this company are hereby authorized and directed to take such steps as are necessary to give effect to this resolution."

Article 5. The number of shares of the corporation outstanding at the time of adoption of said resolution authorizing the voluntary dissolution of the corporation was:

Class	Number of Shares
Common	86,577.25

11,055 preferred and 69,172.75 Common Shares held in Treasury.

Article 6. The number of shares voting for said resolution authorizing the voluntary dissolution of the corporation was 85,853.85; and the number of shares voting against said resolution authorizing the voluntary dissolution of the corporation was: None

Class	Number of Shares For	Against
Common	85,853.85	None

In Witness Whereof, the undersigned corporation has caused this statement to be executed in its name by its .....President, and its corporate seal to be hereto affixed, attested by its .....Secretary, this 27th day of June, 1947.

BLACK-MARSHALL OIL COMPANY,
By W. H. BLACK,
Its President.

(Seal)

Place (Corporate Seal) here.

Attest: Dale G. Ives, By Its Secretary.

State of Kansas, County of Barton, ss.

I, Isabel Obee, a Notary Public, do hereby certify that on the 27th day of June A. D. 1947, W. H. Black, President [fol. 1521] personally appeared before me and being first duly sworn by me acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

In Witness Whereof, I have hereunto set my hand and seal the day and year before written.

ISABEL OBEE,
Notary Public.

(Seal)

Place (Notarial Seal) here.

My commission expires: Nov. 25, 1947

Form E.

Box 2643, File 671.

Statement of Intent to Dissolve by Voluntary Action of the Corporation pursuant to Section 76 of "The Business Corporation Act"

of

Black-Marshall Oil Co.

Filed Jun 28, 1947.

EDWARD J. BARRETT,
Secretary of State.

Certificate Number 2955.

State of Illinois
Office of
The Secretary of State

To all to whom these Presents Shall Come, Greeting:

Whereas, Articles of dissolution duly signed and verified of Black-Marshall Oil Company have been filed in the Office of the Secretary of State on the 30th day of June A. D 1947, as provided by "The Business Corporation Act" of Illinois, in force July 13, A. D. 1933.

Now, Therefore, I, Edward J. Barrett, Secretary of State of the State of Illinois by virtue of the powers vested in me by law, do hereby issue this certificate of dissolution [fol. 1522] and attach thereto a copy of the Articles of dissolution of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois.

Done at the City of Springfield this 30th day of June A. D. 1947 and of the Independence of the United States the one hundred and 71st.

EDWARD J. BARRETT,
Secretary of State.

(Seal)

Date Paid 6-30-47
Filing Fee $1
Clerk UEL

Form F.

(These articles to be filed in triplicate.)

Articles of Dissolution Pursuant to Section 80 of "The Business Corporation Act"

of

Black-Marshall Oil Company

983 31

Paid Jun 30, 1947, Edward J. Barrett, Secretary of State.

To Edward J. Barrett, Secretary of State, Springfield, Illinois.

The undersigned corporation, for the purpose of dissolving, and pursuant to the provisions of "The Business Corporation Act" of the State of Illinois relating to the dissolution of said corporation, hereby executes the following articles of dissolution:

Article 1. Name of corporation is Black-Marshall Oil Company.

Article 2. On the 28th day of June, A.D. 1947, the corporation filed with the Secretary of State, and on the 30th day of June, A.D. 1947, with the Recorder of Deeds of the County in which the registered office of the corporation is situated, a statement of intent to dissolve.

[fol. 1523] *Article 3. All debts, obligations and liabilities of the corporation have been paid and discharged, or that adequate provision has been made therefor.

*Article 4. All the remaining property and assets of the corporation have been distributed among its shareholders, in accordance with their respective rights and interests.

*Article 5. There are no suits pending against the corporation in any court, or that adequate provision has been

made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending suit.

(Over)

In Witness Whereof, the undersigned corporation has caused these articles to be executed in its name by its ..... President and its corporate seal to be hereto affixed, attested by its ..... Secretary this 30th day of June, A. D. 1947.

(Seal)

BLACK-MARSHALL OIL COMPANY,

By W. H. BLACK,
Its President.

Place (Corporate Seal) here.

Attest: Dale G. Ives, Its Secretary.

State of Illinois, County of Mercer, ss.

I, Myrtle Lundblad, a Notary Public, do hereby certify that on the 30th day of June, A. D. 1947, W. H. Black President personally appeared before me and being first duly sworn by me acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

In Witness Whereof, I have hereunto set my hand and seal the day and year before written.

MYRTLE LUNDBLAD,
Notary Public.

(Seal)

Place (Notarial Seal) here.

[fol. 1524] Form F.

Box 2643, File 671.

Articles of Dissolution

Pursuant to Section 80 of "The Business Corporation Act"

of

Black-Marshall Oil Company

Filed Jun 30, 1947.

EDWARD J. BARRETT,
Secretary of State.

[fol. 1553]

EXHIBIT C TO PLAINTIFF'S EXHIBIT 95.

Stock Purchase Agreement

This agreement entered into by and between the National Cooperative Refinery Association, a Kansas corporation, hereinafter referred to as First Party, and [fol. 1554] W. H. Black and Dale G. Ives, executor of the estate of Earl Boyd, deceased, hereinafter referred to as Second Parties, unless individually designated:

Witnesseth:

Whereas, First Party desires to purchase certain stock of the Black-Marshall Oil Company, and Second Parties desire to sell all of their stock to First Party.

Now Therefore, in consideration of the mutual covenants and agreements herein contained, it is understood and agreed as follows:

1. Black-Marshall Oil Company a thorized the issuance of 200,000 shares of common stock. 18,520 shares were never issued. 23,500 shares were repurchased as treasury stock. There is an agreement outstanding for the repurchase of an additional 15,000 shares of the common stock to

be held as treasury stock. Some time during the year 1944, the company advanced to W. H. Black, the sum of $831,483.06 for the purpose of purchasing common stock, and he did purchase common stock in the amount of 56,402.75 shares. This stock is held in the vault of the company without having been transferred and will either be turned over to the company as treasury stock or so handled that no present stockholders will receive any advantage or disadvantage due to its acquisition. There is now outstanding in the names of the individual stockholders, stock in the amount of 86,577.25 shares. Of the amount so outstanding, Second Parties own or control 65,126 shares.

2. First Party agrees to purchase all of the stock of Second Parties at a value to be arrived at as follows: All of the stock of Black-Marshall Oil Company outstanding in the names of individual owners is valued at $7,500,000, less the cost of acquiring the 15,000 *share* of stock held by Deering Marshall in the amount of $187,500, which the company has obligated itself to pay, and less any amount due First Party by Black-Marshall Oil Company as of June 30, 1947. The value of each individual share of stock will be obtained by dividing the sum so arrived at by 86,577.25 shares.

[fol. 1555] 3. Second Parties warrant and agree as follows:

(a) The book value of the Black-Marshall Oil Company assets other than oil leases and the usual fixtures and appurtenances pertaining thereto, were as of April 1, 1947, of the value of $1,400,000 over and above all liabilities, except income tax for the current year, the amount due Deering Marshall, above referred to, in the sum of $187,500, and the amount due First Party.

(b) There are no debts or obligations of any character outstanding against the Black-Marshall Oil Company except current bills shown on the books of the company, the obligation due Deering Marshall, the indebtedness due First Party and income tax for the current year.

(c) In support of this warranty, Second Parties agree to place in escrow, cash or government bonds either with the Central Bank for Cooperatives, Washington, D. C.,

or the Fourth National Bank, Wichita, Kansas, whichever they elect, the proportionate part of $500,000 which the stock sold by them bears to the total amount of stock outstanding. Such cash or bonds shall be held by the depository for the purpose of guaranteeing the warranty set out in sub-paragraphs (a) and (b) of this paragraph, and should any definite obligations of any character appear against the Black-Marshall Oil Company within two years from June 30, 1947, other than current income tax, current bills, and the indebtedness to Deering Marshall and First Party, said depository shall pay to First Party from the funds so deposited, such proportionate part of the obligations as the stock purchased from said Second Parties bears to the total amount of stock outstanding.

On June 30, 1948, the depository will release to Second Parties, one-half of the sum so deposited, less any amount which has been used to cover any such obligations above referred to, and on June 30, 1949, said depository will release to Second Parties, all of the deposited amount remaining.

In case litigation results from any claims covered by the above warranty, Second Parties shall have the right to defend same or participate with First Party in the defense.

[fol. 1556] 4. The books of the company properly reflect the amount of W. H. Black's indebtedness to the Black-Marshall Oil Company, excepting the $831,483.06 charged to W. H. Black for purchase of stock, and that the same will be paid at the time payment is made by First Party for the stock of the Black-Marshall Oil Company.

5. Second Parties agree that they have not, since April 1, 1947, and will not, dispose of any inventory or equipment or other assets of the Black-Marshall Oil Company except in the regular course of the company's business, and that they will continue the operations of the Black-Marshall Oil Company under the same methods they have in the past, unless otherwise instructed by First Party, until such time as the stock is delivered to First Party on June 30, 1947.

6. This transaction shall be closed and completed on June 30, 1947.

In Witness Whereof, the parties hereto have affixed their signatures this ..... day of ....., 1947.

NATIONAL COOPERATIVE REFINERY ASSOCIATION.

By:.....
President.

Attest:

.....
Secretary, First Party.

.....

.....
Second Parties.

[fol. 1563]

PLAINTIFF'S EXHIBIT 99.

Plaintiff's Exhibit 99. Common stock certificates Nos. 403 and 404 have been designated as parts of the printed record.

Certificate No. 403 is for 62,126 common shares issued to [fol. 1564] National Cooperative Refinery Assn. of McPherson, Kans., dated June 10, 1947. On the stub, in addition to name of owner, etc., appears the following language: "Transferred from see list attached." In place of stock certificate, a sheet of paper is attached to stub, on which the following language appears:

"Stockholder	Date of Issue	Certificate No.	No. of Shares
W. H. Black	1-23-40	1	10000
W. H. Black	1-17-41	155	2370
W. H. Black	1-17-41	158	5000
W. H. Black	1-17-41	159	5000
W. H. Black	1-17-41	160	5000
W. H. Black	1-17-41	161	10000
W. H. Black	1-17-41	165	2000
W. H. Black	1-17-41	166	2000

"Stockholder	Date of Issue	Certificate No.	No. of Shares
W. H. Black	6- 2-41	196	1087.50
W. H. Black	3-20-42	207	95.466 2/3
W. H. Black	3-20-42	216	201.683 1/3
W. H. Black	3-20-42	218	165.75
W. H. Black	3-20-42	219	9.60
W. H. Black	3-20-42	220	272.50
W. H. Black	3-20-42	221	100
W. H. Black	3-20-42	222	55
W. H. Black	3-20-42	223	100
W. H. Black	7-17-44	290	2000
W. H. Black	7-17-44	291	250
W. H. Black	7-17-44	292	150
W. H. Black	7-17-44	293	200
W. H. Black	8-15-46	398	11714
W. H. Black	1- 2-47	492	1354.5
A. W. Kincade	7-27-44	301	1000
A. W. Kincade	7-27-44	302	1000
A. W. Kincade	7-27-44	303	1000
Total Shares			62126

Above shares transferred June 10, 1947, to National Cooperative Refinery Association on Certificate No. 403 for 62,126 shares."

[fol. 1565] Certificate No. 404 is missing. The stub indicates it is for 3,000 shares issued to National Cooperative Refinery Assn. of McPherson, Kans., dated June 10, 1947. On the stub, in addition to name of owner etc., appears the following language: "Transferred from Dale G. Ives, Executor of estate of Earl D. Boyd, deceased, dated July 10, 1943.

No. of original Certificate	No. of original Shares	No. of shares Transferred
255	2,000	2,000
394	1,000	1,000"

Plaintiff's Exhibit 100.

[Plaintiff's Exhibit 100. Common stock certificates Nos. 301, 302, 303 and 398 have been designated as parts of the printed record.

Certificate No. 301 is for 1,000 common shares issued to A. W. Kincade, dated July 27, 1944. The following language is written on the face of the certificate: "Transferred to NCRA 6/10/47 on Cert. 403." Attached to the certificate is an "assignment separate from certificate" in blank signed by A. W. Kincade.

Certificate No. 302 is for 1,000 shares common stock issued to A. W. Kincade, dated July 27, 1944. The following language is written on the face of the certificate: "Transferred to NCRA 6/10/47 on Cert. 403." Attached to the certificate is an "assignment separate from certificate" in blank signed by A. W. Kincade. The following statement is attached to the certificate:

This statement represents a total of 25,000 shares of Common Stock transferred to the following:

Certificate No.	Name	Date	Shares
296	Roos, Edward	7-27-44	10,000
297	Gill, Richard	7-27-44	10,000
298	Kincade, A. W.	7-27-44	1,000
299	Kincade, A. W.	7-27-44	1,000
301	Kincade, A. W.	7-27-44	1,000
302	Kincade, A. W.	7-27-44	1,000
303	Kincade, A. W.	7-27-44	1,000
Total			25,000

[fol. 1566]

Date	Name	No. of Original Certificate	No. Original Shares	No. Shares Transferred
7-27-44	McKinney, Hope E.	126	900	900
7-27-44	Hokin, Louis Ets	73	300	300
7-27-44	Hokin, Louis Ets	266	200	200
7-27-44	Jones, Roy L.	71	300	250
7-27-44	Hokin, Barney Ets	195	300	250

Date	Name	No. of Original Certificate	No. Original Shares	No. Shares Transferred
7-27-44	Robinson, E. W.	168	600	500
7-27-44	Arren, A. M. and/or Mabel	148	100	50
7-27-44	Wadleigh, H. C.	88	30	30
7-27-44	Wadleigh, H. C.	149	700	700
7-27-44	Wadleigh, H. C.	250	775	770
7-27-44	Stites, H. D. and/or Larry	188	500	500
7-27-44	Robinson, L. E.	74	1,050	1,050
7-27-44	Robinson, L. E.	153	700	700
7-27-44	Boyd, Earl D.	3	10,000	6,000
7-27-44	Riley, Howard W.	135	500	250
7-27-44	Riley, Mitchell	133	1,000	750
7-27-44	Hall, Edith	60	1,350	1,300
7-27-44	McBride, R. P.	257	200	200
7-27-44	Constant, Keny D.	137	500	500
7-27-44	Danford, T. N. and/or Ruth W.	110	2,100	1,800
7-27-44	Brown, William and/or Velma	175	100	100
7-27-44	Brown, William	276	100	100
7-27-44	Berglund, Spencer I.	154	500	500
7-27-44	Nelson, Samuel A.	19	300	300
7-27-44	Nelson, Samuel A.	152	400	400
[fol. 1567]				
7-27-44	Nelson, Mabel L.	118	1,000	500
7-27-44	Hall, Hays	65	960	960
7-27-44	Hall, Hays	281	1,400	1,040
7-27-44	Sherrard, J. R. and Marie	109	2,500	2,500
7-27-44	Sherrard, J. E. and Marie	109	2,500	2,500
7-27-44	Runborn, Beulah	177	100	100
7-27-44	Robinson, L. E.	224	250	250
7-27-44	Stephens, Clarence and/or Nancy	146	300	250
Total			31,125	25,000

Certificate No. 303 is for 1,000 common shares issued to A. W. Kincade, dated July 27, 1944. The following language is written on the face of the certificate: "Transferred to NCRA 6/10/47 on Cert. 403." Attached to the certificate is an "assignment separate from certificate" in blank signed by A. W. Kincade. The statement attached to the certificate is identical with that attached to certificate No. 302.

Certificate No. 398 is for 11,714 common shares issued to William H. Black of Great Bend, Kans., dated 8/15/1946. The following language is written on the face of the certificate: "Transferred to NCRA 6/10/47 on Cert. 403." On the stub, in ad appears the following language: "Transferred from see list attached.

No. of Original Certificate	No. of Original Shares	No. of Shares Transferred
See list attached	11714	11714"

The reverse of the certificate shows assignment in blank by William H. Black. The following statement is attached to the certificate:

[fol. 1568] (Copy)

PXJ—CWH

Date of Issue	Stockholder	Certificate No.	No. Shares
1-23-40	Spencer I. Berglund	77	1110
6- 2-41	Dale G. Ives	189	150
7-15-41	Vernon T. Clark and/or Grace M. Clark	190	165
11- 1-43	I. Berglund	272	140
3-20-45	Gerald C. Baldwin	377	50
3-20-45	John S. Bowers	378	125
3-20-45	Dorthea Britton	379	37
3-20-45	H. E. Britton	380	375
3-20-45	Fred O. Brown	381	250
3-20-45	Donald C. Clark	382	37

Date of Issue	Stockholder	Certificate No.	No. Shares
3-20-45	Hazel Constant	383	425
3-20-45	Dale G. Ives	384	5000
3-20-45	Maybelle A. Lundblad	385	125
3-20-45	Myrtle Lundblad and/or Maybelle Lundblad	386	925
3-20-45	Annabelle McClanahan	387	25
3-20-45	Harry Ogle	388	125
3-20-45	Maud T. Rogers	389	1775
3-20-45	Ricka S. Rogers	390	25
3-20-45	C. F. Runborn	391	150
3-20-45	Emma E. Stevenson	392	75
3-20-45	J. K. Stevenson	393	625
	Total		11,714

Above shares purchased by W. H. Black as of 8-15-46 for which Certificate #398 was issued in the amount of 11,714 shares of common stock.

[fol. 1574]

PLAINTIFF'S EXHIBIT 102.

[Plaintiff's Exhibit 102. Common stock certificates Nos. 296, 297, 298, 299 have been designated as parts of the printed record.

Certificate No. 296 is for 10,000 shares common stock issued to Edward Roos, Waldorf Astoria Hotel, New York, N. Y., dated July 27, 1944. The statement attached to the stub is identical with that attached to certificate No. 302.

Certificate No. 297 is for 10,000 shares common stock issued to Richard Gill, dated July 27, 1944. The following [fol. 1575] language is written on the face of the certificate: "Retired 6-1-47." Attached to the certificate is an "assignment separate from certificate" assigning to Home State Bank, Russell, Kansas, the 10,000 shares of common stock represented by Certificate No. 297, signed by Richard Gill,

dated March 26, 1945. The statement attached to the certificate is identical with that attached to certificate No. 302.

Certificate No. 298 is for 1,000 shares common stock issued to A. W. Kincade, dated 27, 1944. The following language is written on the face of the certificate: "Retired 6-1-47." Attached to the certificate is an "assignment separate from certificate" in blank by A. W. Kincade. The statement attached to the certificate is identical with that attached to certificate No. 302.

Certificate No. 299 is for 1,000 shares common stock issued to A. W. Kincade, July 27, 1944. On the face of the certificate the following language is written: "Retired 6-1-47." Attached to the certificate is an "assignment separate from certificate" in blank by A. W. Kincade. The statement attached to the certificate is identical with that attached to certificate No. 302.

There is no certificate No. 300. The stub is marked "void. Used as sample to printer, to Dale G. Ives 3-20 '44."

[fol. 1576]

PLAINTIFF'S EXHIBIT 108.

Voucher No. 9-34

Black-Marshall Oil Co.
P. O. Box #6
Great Bend, Kansas

Date 9-29-45 Amt. $270,438.00
Payee JV
Address.....
Bauman Office Equipment Co., Inc.
Suspense 270,438.00
Prepared.....
Approved.....
Date Paid 9-29-45 Check No. Listed
Vouchers Payable 270,438.00

Name	Shares	Check No.	Amount
A. M. Amen	50	13506	$ 600.00
Gerald C. Baldwin and/or Chas. N. Baldwin	50	13507	600.00
H. J. Blazer	1,150	13508	13,800.00
Dorothea Britton	38	13509	456.00
H. E. Britton	375	13510	4,500.00
Fred O. Brown	250	13511	3,000.00
William C. Brown and/or Velma Brown	200	13512	2,400.00
Donald C. Clark	38	13513	456.00
Vernon F. Clark and/or Grace M. Clark	200	13514	2,400.00
T. N. Danford	445	13517	5,340.00
T. N. Danford and/or Ruth W. Danford	1,430	13518	17,160.00
[fol. 1577]			
Edith Hall	1,600	13519	19,200.00
Hays Hall	2,200	13520	26,400.00
Barney Ets Hokin	200	13521	2,400.00
Cobert Ets Hokin	50	13522	600.00
Roy L. Jones	250	13523	3,000.00
Maybelle A. Lundblad	150	13526	1,800.00
Myrtle Lundblad and/or Mabelle A. Lundblad	1,100	13527	13,200.00
R. P. McBride	300	13528	3,600.00
Annabelle McClanahan	25	13529	300.00
Mabel L. Nelson	500	13530	6,000.00
Samuel A. Nelson	800	13531	9,600.00
Harry Ogle	200	13532	2,400.00
Howard W. Riley and/or E. Mildred Riley	250	13533	3,000.00
Mitchell Riley	752.5	13534	9,030.00
Maud T. Rogers	1,775	13535	21,300.00
Ricka S. Rogers	25	13536	300.00
Clarence F. Runbom and/or Beulah Runbom	250	13537	3,000.00
J. R. Sherrard	383	13536	4,596.00
J. R. Sherrard and/or Marie Sherrard	3,100	13539	37,200.00

Name	Shares	Check No.	Amount
Clarence Stephens and/or Nancy Stephens	250	13540	$ 3,000.00
Emma E. Stevenson	75	13541	900.00
J. K. Stevenson	625	13542	7,600.00
Hugh D. Stites	360	13543	4,320.00
Hugh D. Stites and/or H. D. Stites, Jr.	250	13544	3,000.00
H. D. Stites, Jr.	415	13545	4,980.00
Ellen Wadleigh	225	13546	2,700.00
H. C. Wadleigh	1,275	13547	15,300.00
			$259,338.00
Hazel Constant	925	13515	5,550.00
Kenneth D. Constant		13516	5,550.00
			$270,438.00

[fol. 1578] PLAINTIFF'S EXHIBIT 109.

Voucher No. 10-10

Black-Marshall Oil Co.
P. O. Box #6
Great Bend, Kansas

Date 10-5-45 Amt. $.....
Payee JV
Address.....
Bauman Office Equipment Co., Inc.

Suspense		22,296.00
Prepared.....		
Approved.....		
Date Paid 10-5-45 Check No. Listed		
Vouchers Payable		22,296.00
Spencer I. Berglund	#13660	20,796.00
John S. Bowers	#13661	1,500.00

(Copy)

October 5, 1945.

Mr. Spencer I. Berglund, 536 Ellis Street, Sarasota, Florida.

Dear Mr. Berglund: Subsequent to your instructions to The Fourth National Bank in Wichita, Kansas, we enclose our check #13660 in the amount of $20,796.00 in payment for 1,733 shares of Black-Marshall Oil Company common stock at $12.00 per share, these shares being represented by the following certificates:

No. 108	750 shares
No. 248	600 shares
No. 262	33 shares
No. 265	50 shares
No. 278	300 shares
Total	1,733 shares

We are also enclosing check #13661 in the amount of $1,500.00 made payable to John S. Bower in full payment for 125 shares of Black-Marshall Oil Company common [fol. 1579] stock @ $12.00 per share, these shares being represented by certificate No. 362. If you will make disposition of the latter check, it will be very much appreciated.

Yours very truly,

BLACK-MARSHALL OIL COMPANY.
LEON F. HUFF.

LFH:mlh

Enclosures 2

Copy to Mr. Dale G. Ives, 202 Stevenson Annex, Aledo, Illinois.

PLAINTIFF'S EXHIBIT 110.

Form T3

Voucher No. 10-22

Black-Marshall Oil Co.
P. O. Box 6
Great Bend, Kansas

Date 10-15-45 Amt. $.....
Payee JV.
Address
Bauman Office Equipment Co., Inc.
Suspense 28,200.00
Prepared.....
Approved.....

Date Paid	Check No. Listed		
10-15-45	Vouchers Payable		28,200.00
	T. N. Danford	#13758	2400.00
	E. W. Robinson	#13759	4800.00
	E. W. Robinson and/or Freda C. Robinson	#13760	1200.00
	L. E. Robinson and/or Maud E. Robinson	#13761	19,800.00

[fol. 1580] (Copy)

October 15, 1945

Mr. Dale G. Ives, 202 Stevenson Annex, Aledo, Illinois.

Dear Dale: Subsequent to your letter of October 12th, enclosing the Danford and Robinson stock, we have issued the following checks in payment of same and enclose them herewith for your disposition.

Name	Ck. No.	Shares	Amount
T. N. Danford	13758	200	$ 2,400.00
E. W. Robinson	13759	400	4,800.00
E. W. Robinson and/or Freda C. Robinson	13760	100	1,200.00
L. E. Robinson and/or Maud E. Robinson	13761	1,650	19,800.00

Yours very truly,

BLACK-MARSHALL OIL COMPANY,
LEON F. HUFF.

LFH/nrs
Enclosures

[fol. 1581] PLAINTIFF'S EXHIBIT 115.

Form T3

Voucher No. 10-30

Black-Marshall Oil Co.
P. O. Box 6
Great Bend, Kansas

Date 10-18-45 Amt. $122,500.00
Payee: A. W. Kincade
Address .....
Bauman Office Equipment Co., Inc.

Suspense	122,500.00
Black-Marshall Oil Company	
Common Stock Certificates:	
No. 269—2,355.72	
No. 298—1,000	
No. 299—1,000	
No. 329— 500	
No. 330— 500	
No. 331— 350	
No. 332—1,294.28	
7,000 shares @ $17.50	$122,500.00

Prepared .....
Approved .....

Date Paid 10-18-45	Check No. 13771
Vouchers Payable	122,500.00

(Copy)

October 18, 1945

Personal

Mr. A. W. Kincade, The Fourth National Bank in Wichita, Wichita 2, Kansas.

Dear Arthur: Subsequent to your letter of October 17, enclosing stock certificates representing 7,000 shares of Black-Marshall Oil Company common stock, we are enclosing our check #13771 in the amount of $122,500.00 in payment thereof. We list below the certificates aggregating the total sum of 7,000 shares:

[fol. 1582]

Certificate No.	No. Shares
269	2,355.72
298	1,000
299	1,000
329	500
330	500
331	350
332	1,294.28
Total	7,000.00

Along with your letter we received a debit to our account in the amount of $17,500.00 representing payment to John P. Gaty for 1,000 shares of common stock of Black-Marshall Oil Company represented by certificate #311; however, the certificate was not enclosed. We know that this was an oversight on your part and will appreciate receipt of the certificate from you as soon as convenient in order that we may make disposition of same.

In line with your letter we have today made a deposit to Bill's account in the Fourth National Bank covering the check in the amount of $24,802.96 dated October 18, 1945.

We are enclosing a remittance in the amount of $250,000.00 which we would like for you to place to the credit of Bill's account, returning to us the duplicate of the deposit slip.

Yours very truly,

BLACK-MARSHALL OIL COMPANY,

LEON F. HUFF.

LFH:mlh
Enclosures

PLAINTIFF'S EXHIBIT 116.

Form T3

Black-Marshall Oil Co.

Voucher No. 10-23
P. O. Box 6
Great Bend, Kansas

Date 10-16-45 Amt. $124,868.00
Payee Richard Gill.
Address.....
[fol. 1583] Bauman Office Equipment Co., Inc.
Suspense 124,868.00
Prepared.....
Approved.....
Date Check
Paid 10-16-45 No. 13764
Vouchers Payable 124,868.00

(Copy)

October 16, 1945

Mr. Richard Gill, 701 Gunter Building, San Antonio, Texas.

Dear Mr. Gill: Subsequent to our telegrams of this date, we are enclosing our check #13764 in the amount of $124,868.00 in payment of 10,000 shares of common stock @ $17.50 per share, which stock is represented by certificate No. 297, less the draft in payment of principal and interest in the amount of $50,132.00 to the Home State Bank, Russell, Kansas. We enclose two notes which were executed by you in the aggregate amount of $50,000.00 to the Home State Bank at Russell, together with the collateral pledge

given them. The amount of $132.00 represents interest due on the indebtedness to the Home State Bank as set out on our check in payment of the balance due you.

Payment for the 2,400 shares will be made direct by The Fourth National Bank in Wichita, Kansas.

Yours very truly,

BLACK-MARSHALL OIL COMPANY,

LEON F. HUFF.

LFH:mlh
Enclosures 4

[fol. 1633] PLAINTIFF'S EXHIBIT 291.

Form N.C.-107

National Cooperative Refinery Association

Voucher No. No. 16266

Petroleum (Symbol) Products
McPherson, Kansas June 30, 1947

To Fourth National Bank
40-1 Wichita, Kansas

Pay to the Order of W. H. Black, P. O. Box 6, Gt. Bend, Kansas,

One miliion and no/100 dollars.....$1,000,000.00

The National Cooperative Refinery Association

DOROTHY FULHAGE,
R. E. YADON.

(Cancelled Bank Stamp).

[On reverse.]

Endorsement: For deposit only. W. H. Black.

Form N.C.-107

National Cooperative Refinery Association

Voucher No. No. 16267

Petroleum (Symbol) Products
McPherson, Kansas July 1, 1947

To Fourth National Bank
40-1 Wichita, Kansas

Pay to the Order of W. H. Black, P.O. Box 6, Gt. Bend, Kansas,

One million, eight hundred fourteen thousand, nine hundred twenty nine and 06/100 dollars
$1,814,929.06

The National Cooperative Refinery Association

DOROTHY FULHAGE,
R. E. YADON.

[fol. 1634] [On reverse.]

Endorsements: W. H. Black; (Cancelled Bank Stamps) Security Trust & Savings Bank of San Diego, Calif.; Federal Reserve Bank of Kansas City; Farmers & Merchants National Bank of Los Angeles, Calif.

Form N.C.-107

National Cooperative Refinery Association

Voucher No. No. 16268

Petroleum (Symbol) Products
McPherson, Kansas July 1, 1947

To Fourth National Bank
40-1 Wichita, Kansas

Pay to the Order of Dale G. Ives, Executor of Estate of Earl D. Boyd, Deceased, 202 Stevenson Annex, Aledo, Ill.

Registered—B-M—$135930 and 00c

The National Cooperative Refinery Association

DOROTHY FULHAGE,
R. E. YADON.

[On reverse.]

Endorsements: Dale G. Ives, Executor of the Estate of Earl D. Boyd, Deceased; (Cancelled Bank Stamps) Federal Reserve Bank of Kansas City; Continental Illinois National Bank and Trust Company of Chicago; National Bank of Aledo.

[fol. 1639] Form N.C.-107

National Cooperative Refinery Association

Voucher No. 7-153 No. 16574

Petroleum (Symbol) Products
McPherson, Kansas July 16, 1947

To Fourth National Bank
40-1 Wichita, Kansas

Pay to the Order of Ruth F. Black or William F. Black, Great Bend, Kansas.

NCRA $234928 and 74cts.....$234,928.74

The National Cooperative Refinery Association

DOROTHY FULHAGE.
R. E. YADON.

(Cancelled Bank Stamp)

[On reverse.]

Endorsement: For deposit. Ruth F. Black, Wm. F. Black; Security Trust & Savings Bank, San Diego, Calif, Federal Reserve Bank of Chicago; Farmers and Merchants National Bank of Los Angeles, Calif.

[fol. 1648] Form N.C.-107

National Cooperative Refinery Association

Voucher No. 9-260 No. 17626

Petroleum (Symbol) Products
McPherson, Kansas September 29, 1947

To Fourth National Bank
40-1 Wichita, Kansas

Pay to the Order of Fourth National Bank, Trust Department, Wichita, Kansas.

NCRA $497819 and 21cts.....$497,819.21

The National Cooperative Refinery Association

DOROTHY FULHAGE.
J. W. TAYLOR.

(Cancelled Bank Stamp)

[On reverse.]

Endorsement: Edith Hahn; Continental Illinois National Bank and Trust Co. of Chicago; Federal Reserve Bank of Kansas City.

[fol. 1649] PLAINTIFF'S EXHIBIT 292.

(See Opposite) ☞

Note

Page 407 is at Start of Card 7.

[fol. 2322] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 4962, 4963, 4964—November Term, 1955

A. M. AMEN, ET AL., Appellants,

v.

WILLIAM H. BLACK, Appellee.

A. M. AMEN, ET AL., Appellants,

v.

WILLIAM H. BLACK and RUTH F. BLACK, Appellees.

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, Appellants,

v.

WILLIAM H. BLACK and RUTH F. BLACK, Appellees.

Appeal from the United States District Court for the District of Kansas

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[fol. 2323] D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants;

Malcom Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Coulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, Chief Judge, and MURRAH, Circuit Judge, and WALLACE, District Judge.

MURRAH, Circuit Judge.

OPINION—November 25, 1955
(Withdrawn by order of May 4, 1956)

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the Company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the Company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

The second stated claim is in the nature of a derivative [fol. 2324] action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the Company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of Company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which Company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

The Spurious Action of the Individual Stockholders.

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellees challenge the propriety of the suits as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are [fol. 2325] either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry Co.*, 40 F.Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." *Blazer* v. *Black*, 10 Cir., 196 F.2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold for an amount sufficient to yield the stockholders

[fol. 2326] $10.00 per share; that the undeveloped properties of the Company were being retained for development at a later propitious time; and that the stockholders should surrender fifty percent of their stock in order to bind the transaction. The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were concededly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will [fol. 2327] not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. *United States* v. *United States Gypsum*, 333 U.S. 364; *United States* v. *Waymire*, 10 Cir., 202 F.2d 550; *McAllister* v. *United States*, 348 U.S. 19; *United States* v. *Oregon Medical Society*, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment

Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil. The contracts in identical terms provided that Black would receive one-fourth of the profits from the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $28,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an automobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he [fol. 2328] and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois cor-

poration with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00, and 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of common for every $2.00 invested and one share of preferred for every [fol. 2329] $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meeting in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The Company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas where the company offices were maintained.

The productive leases in Kansas were developed in 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was con- [fol. 2330] siderable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking

toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the stock of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few days later, Black wrote Ives outlining his negotiations with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal [fol. 2331] with the co-op". Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of

the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $248,750.00 were trans- [fol. 2332-3] ferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group concerning the progress of the supposed sale, or for that matter, the progress of the company, until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by a check to Ives who paid the stockholders from his stock account in the Aledo bank. At this point in the course of events Black had in his possession and in his lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for

each producing well so drilled. The company continued to [fol. 2334] prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders having previously agreed to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the Black-Marshall Oil Company. From the total consideration of the sale of the stock to N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put [fol. 2335] to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it

in the effectuation of that plan. Henceforward Black became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "Al- [fol. 2336] though the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency §363; see also Restatement Agency §261; *Anheuser-Busch* v. *Grovier-Starr Produce Co.*, 128 F.2d 146; *Cox* v. *Pabst Brewing Co.*, 128 F.2d 468; *Siedhoff* v. *Campbell*, 141 Kan. 255, 40 P.2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency §362; see also Restatement Agency §§257, 258.

Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations

were brought home to Black.[1] In their brief the appellees [fol. 2337] concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." *Maryland Casualty Co.* v. *Beebe*, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot

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[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties and Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years". (b) In the early Fall of 1945 when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their [fol. 2338] funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis, only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability rule, see *Blazer* v. *Black,* 10 Cir., 196 F. 2d 139, or the less stringent rule applicable in Illinois, see *Agatucci* v. *Corradi* (Ill.), 63 N.E. 2d 630; *Dunnett* v. *Arn,* 10 Cir., 71 F. 2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See *Auer* v. *Wm. Meyer Co., et al.,* 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur., Trusts, §§220, 225 and 226; *Securities and Exchange Commission* v. *Chenery,* 318 U.S. 80; *Manufacturers Trust Co.* v. *Becker,* 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his [fol. 2339] inequitable conduct. *Falk* v. *Hoffman* (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. *Dunnett* v. *Arn, supra,* at Page 920; *Blazer* v. *Black, supra.*

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. *Dunnett* v. *Arn, supra, Blazer* v. *Black, supra; Falk* v. *Hoffman, supra.* In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were specifically excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With [fol. 2340] respect to the parties falling within this category who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member of the Aledo Group and a large stockholder. It was through Dr. Danford that both Amen and Baldwin were induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the [fol. 2341] stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency, §315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of [fol. 2342] the company in proportion to their equitable stock holdings at the time of the sale along with the other appellants as to whom the trial court found Ives made mis-

representations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

Corporate Claims of the Stockholders and Co-Receivers.

Appellees concede the dual capacity of the appellant-stockholders to seek the rescission of the sale of their stock to Black in 1944 and 1945 and the redress of corporate wrongs in the same action on the theory that upon rescission, the appellants become equitable stockholders with capacity to bring a derivative action on behalf of the corporation. And see *Greer Investment Co.* v. *Booth,* 62 F. 2d 321; Annotation, 168 A.L.R. 906, 914. It is suggested, however, that since the appellant-stockholders in their individual capacities, seek only a rescission of the sale of their stock to Black in 1944 and 1945 and do not seek to set aside the sale of the stock by Black to the N.C.R.A. in 1947, but instead seek to impress a trust upon the proceeds of that sale, they thereby affirmed the sale of the stock by Black, and having thus affirmed the sale, neither Black nor the appellants were thereafter either legal or equitable stockholders of the corporation; and not being stockholders were consequently without capacity to maintain the corporate causes of action.

When the appellants affirmed the sale of the stock to the N.C.R.A. in 1947 and recovered the proceeds from such sale, [fol. 2343] they indisputably ceased to be either legal or equitable stockholders and they obviously cannot thereafter assert a right of action as such. This is so, even though the wrongs complained of were committed while they were either legal or equitable stockholders. See *Hanna* v. *Lyon,* 71 N.E. 778; 3 Fletcher, *Cyclopedia of Corporations,* Sec. 1286, page 988. We therefore hold that the asserted corporate claims are not maintainable by these former stockholder-appellants. The question remains whether the corporate claims are maintainable by the receivers of this dissolved Illinois corporation.

The receivers of the corporation, standing as they do in the corporate shoes, have no greater right to sue or be sued than the corporation. From the date of its formal dissolution on July 1, 1947, the corporation ceased to exist as a legal person and was thereafter incapable of maintaining

an action in the absence of enabling statutory authority. *O'Neill* v. *Continental Illinois Co. et al*, 93 N.E. 2d 160 (Ill. 1950); *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U.S. 257; *United States* v. *Safeway Stores* (10 Cir.), 140 F. 2d 834. Parg. 157.94 of the Illinois Business Corporation Act of 1933 (Chap. 32, Ill. Rev. Stat. 1949) provides that: "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the cor- [fol. 2344] poration may be prosecuted or defended by the corporation in its corporate name."

The manifest purpose of Parg. 157.94, supra, was to provide a grace period for winding up the affairs of the dissolved corporation during which it could sue and be sued on rights and liabilities incurred before dissolution. 16 Fletcher, *Cyclopedia of Corporations*, Sec. 8158, page 916; *United States* v. *Safeway Stores, supra.* But the statute is not one of limitations but a condition upon a right of action. See *O'Neill* v. *Continental Illinois Co., supra*, page 165. And the statutory words, "any remedy available . . . for any right or claim" necessarily embraces a right of action sounding in fraud.

The co-receivers' action was commenced on July 14, 1950, more than two years after dissolution, and is not within the two-year statutory grace period. The co-receivers intervened in the abortive stockholders' suit commenced within the two-year grace period, but at the conclusion of the evidence in the consolidated cases, they elected to stand on their original action. The election was coercive, but no point is made of it on appeal, and the receivers must therefore stand on that suit.

But even so, the order appointing the receivers specifically set aside and rescinded the corporate dissolution and adjudged it a nullity "for all purposes" until further order of the court. A copy of the order vacating the dissolution was forwarded to the Secretary of State of Illinois, and the receivers were authorized and directed "to take all action [fol. 2345] that may be necessary or proper in this regard."

On this record, that order is final and subsisting. It is a judgment of a court of competent jurisdiction of the parties and subject matter, is not void upon its face, and is therefore invulnerable to attack here. 16 Fletcher, *Cyclopedia of Corporations*, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; *Town of Vandalia et al* v. *St. Louis, V. & T. H. R. Co. et al* (*Ill.*), 70 N.E. 662; *Blanchard Bro. & Lane* v. *S. G. Gay Co. et al* (*Ill.*), 124 N.E. 616; *Miller* v. *Union State Inv. Co. et al* (*Ill.*), 61 N.E. 2d 764; *Badger* v. *Hoidale* (8th Cir.), 88 F. 2d 208. Indeed, no attack is made upon it in these proceedings. We conclude that Parg. 157.94 is inapplicable to these asserted causes of action by the co-receivers, and that the corporate causes are maintainable by them.

We come, then, to the corporate claim to the effect that Black surreptitiously and fraudulently procured the issuance to him of 32,457.50 shares of the corporation's common stock which he sold to the N.C.R.A. for $51.06 a share, and for which he is a constructive trustee and should be required to account. Black has denied these allegations and pleaded laches and the analogous limitations. It is incumbent upon the receivers, therefore, standing in the shoes of the corporation, to prove the claims of fraud by convincing evidence.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939 Black discussed with Ives his plan to organize [fol. 2346] a corporation so that they could operate "as a company instead of as an individual". In November of 1939, Black proposed to the board of directors of Landowners Association to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corporation in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of

preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered [fol. 2347] that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who repasted them in the stock book. The stubs were not in secretary Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a nota-

tion "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were [fol. 2348] issued to him and Marshall in consideration of the transfer of the five Barton county oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the record is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1939 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $24,000.00 expended. $8,000.00 ($3,000.00 for the Krier lease and $5,000.00 on a drilling [fol.] contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organiza-

tion of the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

The question, then, is whether the asserted corporate claims are barred by the Kansas statute of limitations or analogous laches.

Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." *Sauberli* v. *Sledd* (Kan. 1936), 55 P.2d 415, 419, and cases [fol. 2349] cited; *Dalton* v. *Hill* (Kan. 1950), 219 P.2d 710, 716; *Lewis* v. *Duncan* (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in *Blazer* v. *Black*, 196 F.2d 139, 147. See *Dalton* v. *Lawrence Nat. Bank* (Kan. 1950), 219 P.2d 719; *Guilfoyle* v. *Brown* (Kan. 1939), 88 P.2d 1082; *Hughes* v. *Reed* (10 Cir.), 46 F.2d 435; *Curtis* v. *Connly*, 257 U.S. 260, 66 L.Ed. 222, 42 S.Ct. 100; Annotation, 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, §59, page 55; 41 Col. L.Rev. 686, *The Statute of Limitations in Suits to Remedy Corporate Abuse;* 47 Yale L. Journ., No. 6, 1004, *The Statute of Limitations as Applied to Stockholders' Derivative Suits.*

The appellees earnestly insist that the corporation had full notice and knowledge of the issuance of the challenged stock in consideration of the Barton County leases; that such knowledge was revealed to the stockholders and directors in each annual audit report, copies of which were circulated to all of the stockholders and directors; that the minutes of each stockholders meeting subsequent to 1941 showed Black as the owner of the full amount of the challenged stock. That with such knowledge the corporation, by the affirmative acts of its stockholders and board of directors, approved and ratified the issuance of this stock, and that the corporation cannot now be heard to deny the knowledge of the fraud within the applicable limitations.

It is true that the first annual audit report of the com- [fol. 2350] pany for the fiscal year ending July 31, 1940 and each succeeding audit report for the fiscal years from 1941 through the last eleven-month period ending June 30, 1947, showed as a part of the history of the corporation, the board of director's authorization for the issuance of 9,055 shares of preferred stock of the company and 122,500 shares of the common stock of the company, in exchange for the five Barton County, Kansas oil and gas leases. This authorization also included the assumption by the company of a liability existing against said leases in the amount of $8,827.93. And it is also true that the books of the company showed the fluctuations in stock ownership in Black from 11,000 shares (10,000 shares of common and 1,000 shares of preferred) in 1941 to 70,000 shares in 1942; then to 52,816 shares in 1943; 46,057 shares in 1944; 46,057.50 in 1945; the same amount plus 6,804 shares held jointly with his wife in 1946; and 6,804 shares in 1947, during which year the N.C.R.A. owned a majority of the authorized stock of the corporation. The minutes further revealed the adoption of a resolution by the board of directors in December of 1944, authorizing the company to purchase 38,978 shares of Deering J. Marshall stock, and the amendment of the by-laws authorizing Black, as president of the corporation, to purchase on behalf of the corporation all or any part of the outstanding capital common stock of Black-Marshall for the account of the corporation to be used as treasury stock or to be retired on the books of the company.

Unquestionably a corporation is chargeable with actual [fol. 2351] and constructive notice and knowledge of that which was brought home to it in the administration of the affairs of the corporation as reflected by its books and records; and it is charged with any information disclosed from an inquiry prompted by the face of the record. *Farmer* v. *Standeven*, 93 F.2d 959 (10 Cir.); *Connell* v. *Saco Oil Co.* (Kan. 1950), 223 P.2d 1020. And notice to an officer of the corporation in the line of his duty is usually notice to the corporation. *Curtis* v. *Connly, supra; Hughes* v. *Reed, supra.*

Black, of course, had notice and knowledge of the fraud from its inception, but such notice or knowledge is not imputable to the corporation, for he was certainly acting outside the scope of his authority and in direct derogation of the interests of the corporation. Indeed, the presumption is that he concealed such knowledge rather than that he communicated it to the corporation. 3 Fletcher, Cyclopedia of Corporations, §§819 and 820. There is nothing on the face of the minutes, audit reports, or records of the company to show that of the 122,500 shares of common stock of the company issued in exchange for the five Barton County leases, 64,870 shares were issued to Black for his and Marshall's interests therein. And there is nothing on the face of the records of the company to show that the stock listed in Black's name represented 32,457.50 shares of stock issued to him in consideration of his interest in these leases.

The audit reports did incite inquiry. Director James, acting on behalf of the Landowners' Group of stockholders, challenged the legality of the issuance of the 122,500 shares [fol. 2352] in exchange for the five Barton County leases in the early part of 1941 as violative of the stock ratio fixed in the preorganization agreement. His concern was in behalf of the Landowners' Group whose stock ownership was diminished by the issuance of the stock to Black. In explanation Ives suggested that all five of the leases were not included in the original agreement and that the additional stock was issued in exchange for the Hoffman and Krier leases. But this explanation was contrary to the facts, and indeed contrary to the recitations in the audit reports. The record shows that after the Landowners' Group challenged

the issuance of this stock, James met Black in Wichita where Black made peace with him and his associates. The record does not indicate what arrangements were made between them. It does indicate that James resigned as director of the company in January, 1943, and that he and Black thereafter dealt in the stock of the company on friendly terms.

There were members of the Aledo Group on the board of directors throughout most of the history of the company until their stock was sold in 1945. There is nothing on this record to indicate that any of these directors or stockholders had actual notice of the inquiry conducted by James for the Landowners' Group or that any of them were moved to make any inquiry concerning the issuance of the stock or Black's ownership of the large quantity of stock appearing in his name on the stockholders' list at the annual stockholders' meetings. The audit reports, the minutes of the meetings and all other corporate records were available to all of the stockholders and directors. Indeed, the audit [fol. 2353] reports were circulated among and approved by the stockholders and by the directors. It may be suggested with good cause that the Aledo directors were put on the same inquiry as the Landowner's Group and that a reasonably prudent inquiry would have disclosed all of the facts relating to the issuance of the challenged stock to Black.

Undoubtedly one of the most important determinants of reasonable diligence for the purpose of discovery and accrual is the relationship of the parties. It is established Kansas law that the directors or officers of a corporation are not trustees of an express trust as to whom the statute of limitations is inapplicable, at least until repudiation; but they do stand in a fiducial relationship of trust and confidence to the corporation and its stockholders, and may be held to strict accountability as trustees of an implied or constructive trust resulting from fraudulent transactions with the corporation or its stockholders. *Dalton* v. *Lawrence National Bank, supra; Hotchkiss* v. *Fischer* (Kan. 1932), 16 P.2d 531; *Federal Reserve Life Ins. Co.* v. *Gregory* (Kan. 1931), 294 Pac. 859; 3 Fletcher, Cyclopedia of Corporations, §838, pages 173-187. The duty to exercise reasonable diligence to discover fraud on the corporation by its fiduciaries

certainly ought to be judged in the light of the duty of such fiduciaries to strictly account to the corporation touching their stewardship. *Dalton* v. *Lawrence Nat. Bank, supra; Hotchkiss* v. *Fischer, supra.* And see *Marcus* v. *Otis* (2d Cir.), 168 F.2d 649. The law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon [fol. 2354] the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty of the party committing the fraud to disclose the truth to the other. *Auer* v. *Wm. Meyer Co.* (Ill. 1944), 54 N.E. 2d 394. And there is very respectable authority for saying that the statute of limitations is "tolled while a corporate plaintiff continues under the domination of the wrong-doers." See *Michelsen* v. *Penney* (2d Cir.), 135 F.2d 409; 39 Col.L.Rev. 842, *The Statute of Limitations in Stockholders' Derivative Suits Against Directors.* In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made." *Dalton* v. *Hill*, 219 P.2d 710, 716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." *Connell* v. *Saco Oil Co.*, 223 P.2d 1020, 1027. See also *Dalton* v. *Lawrence Nat. Bank, supra.* In any event, it would be purely fictional and wholly inadmissible to require the corporation to suspect and investigate its president and dominant officer.

It is in this setting that we must ultimately judge whether the corporation discovered or should have discovered the fraud within the two years next preceding the bringing of this suit. Black not only occupied the position of director and dominant officer, he was a promoter of the corporation, [fol. 2355] in which capacity he also sustained a fiducial relationship which forbade him under penalty of strict accountability to take any unfair advantage or reap any secret profits to the detriment of the corporation or the stockholders. 1 Fletcher, Cyclopedia of Corporations, §193; 13 Am. Jur., Corporations, §115, page 254.

There can be no question of Black's complete domination of the corporation from its inception until he sold his stock to N.C.R.A. Nor can there by any question that Black acquired the 64,870 shares of promotional stock under circumstances which he never disclosed to the stockholders or the directors during the entire history of the corporation, and which he could not explain from the witness stand. We do not believe that the recitations in the audit reports or the information on the stock lists were sufficient to give either actual or constructive notice to the corporation of his fraud in the acquisition of the stock. The proof is that actual notice of the circumstances under which the stock was issued was not discovered until within two years before the suit was commenced, and it is therefore not barred.

We hold that the 32,457.50 shares of stock of the company issued to Black and sold by him to the N.C.R.A. in 1947 belonged to the corporation, and Black should be required to account. We cannot determine the exact value of that stock in relation to the total amount of stock entitled to participate in the proceeds of the sale of the company for we cannot determine from this record the total amount of stock entitled to participate in the sale. We do know that a part of the stock of the Aledo Group entitled to [fol. 2356] participate was retired prior to the 1947 sale. The participation of the retired stock in the sale of the company would pro tanto diminish the sale price of each of the shares of stock entitled to participate in the sale. These computations we must leave to the trial court.

Corporate Claims for Personal Profits Realized By Black From the Use of Corporate Funds.

During the early history of the company, Black advanced money and credit to the company for the development of its properties. During the most prosperous days of the company, and particularly after the loan from the N.C.R.A. in 1945, Black borrowed large sums of money from the company with which he purchased company stock, a farm in Illinois, a commercial tuna boat on the West coast, and engaged in other commercial ventures for personal profit. The receivers, contending that these borrowings were unauthorized and illegal under the by-laws of the

corporation, seek an accounting from Black for the profits realized from the use of corporate funds.

At all times from the inception of the company, the company books reflected Black's advances to and from the company. A regular quarterly meeting of the board of directors on September 26, 1947 approved the advances to or for the account of Black in the sum of $1,293,009 59 prior to August 1, 1946. The trial court made specific findings for each year based upon the books of the company, to the effect that on June 30, 1947 Black owed the company $591,-064.07 which he paid by his personal check at the time of dissolution. In 1946 the corporation had actual and con-[fol. 2357] structive knowledge of these advancements and of Black's heavy indebtedness to the company. When Black settled his accounts with the corporation on June 30, 1947 the directors and stockholders had knowledge of and necessarily approved Black's borrowings from the company. The Illinois statute makes it a criminal offense to vote for the making of a loan to an officer or director of the corporation. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(h). And the director of a corporation who votes for the making of a loan to an officer or director is jointly and severally liable to the corporation for the amount of such loan until repaid. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(d). But while it may be criminal to vote for the making of a loan and the directors may be liable to the corporation for its repayment, it does not necessarily mean that such loans are fraudulent or that a director is accountable to the corporation for the profits from such loans. 3 Fletcher, Cyclopedia of Corporations, §955. These transactions are further evidence that Black dealt with the company as his own and without let or hinderance from the stockholders or other directors. But the trial court concluded that they had been approved and ratified by all of the stockholders of the corporation in June of 1947, and we will not say that the court's judgment in that respect is clearly erroneous.

The fourth and last corporate claim complained of Black's self-dealings with the corporation to its detriment and to the benefit of himself and Mrs. Black. Sometime in 1945 Black and A. W. Kincade caused the Ferrell-Young Drilling Company to be organized with Young, Ferrell,

Mrs. Black and Mrs. Kincade as equal partners. This drill- [fol. 2358] ing company drilled wells for the Black-Marshall Oil Company and engaged in other drilling operations. Mrs. Black's reportable income from the partnership in the year 1946 was $38,000.00. In dealing with the corporation, Mr. and Mrs. Black were of course one and the same party. And equity will scrutinize the transactions of a fiduciary with a corporation in matters of this kind with extreme care to make sure that the transactions were at arms length and that the corporation suffered no detriment. *Winger* v. *Chicago City Bank & Tr. Co.* (Ill. 1946), 67 N.E. 2d 265; 3 Fletcher, Cyclopedia of Corporations, §924, pp. 357-60. But the law does not forbid corporate officers from dealing with the corporation merely because they are such. Such transactions are not inherently dishonest or invalid for that reason alone. 3 Fletcher, Cyclopedia of Corporations, §885, page 283; §913, page 329; §917, page 337. The record shows without dispute that it is the custom for companies like Black-Marshall to independently contract for the drilling of their wells and that the Ferrell-Young Drilling Company was paid the prevailing price in the field for its drilling operations; that Ferrell and Young were experienced drillers and that it was to the interest of the corporation to have the benefit of their experience in the corporation's drilling operations. While the trial court did not make findings in that respect, we take the view that the transactions were not fraudulent and that the corporation suffered no detriment, and we will not require Black to account.

Black was also the owner of a "drilling-in unit" which he rented to the company on a per diem basis, but the [fol. 2359] evidence shows without dispute that the rental was fair and in accordance with the prevailing practice at that time and place, and Black is not required to account for his profits.

In 1945 and 1946, Black, acting as president and managing officer of the corporation, conveyed undivided interests in oil and gas leases of Black-Marshall to A. W. Kincade with the express understanding with Kincade that Kincade would account to him for a half interest in the profits derived from these properties and that upon demand he would

convey an undivided one-half interest in such properties. And other undivided interests in other properties were conveyed to Mrs. Black. None of these properties were sold to N.C.R.A. and in 1948 upon demand Kincade conveyed an undivided one-half interest to Black. There can be no doubt of the fraudulent character of these particular transactions. Black first denied it, and then admitted it, and he should be required to account.

Finally the receivers seek to recoup the profits realized by Black from the sale of company properties to William F. Pielsticker for Black's account. After the N.C.R.A. had become the dominant stockholder in the company and the stockholders had voted on June 27, 1947 to voluntarily dissolve the corporation, a special meeting of the board of directors passed a resolution providing "that all accounts receivable due the Black-Marshall Oil Company by the Landowners Oil Association and all stock in the Landowners Oil Association be sold to Wm. F. Pielsticker for the sum of $53,183.91; that all producing gas leases in Kearny County, Kansas, and all oil and gas leases and mineral interests in the State of Texas owned by the Black-[fol. 2360] Marshall Oil Company be sold to Wm. F. Pielsticker for the sum of $58,115.10; and that one model D-18 Beechcraft twin engine airplane be sold to Wm. F. Pielsticker for the sum of $46,152.56." While the record does not show the exact manner of payment for these properties, it does speak of a Voucher No. 6-428 dated 6-30-47 reciting the "sale of the properties to Pielsticker for $157,451.57 based on values shown in Bradley report at 3-31-47. Selling price as provided in minutes of directors 6-30-47." The minutes of the board of directors meeting authorizing the sale were apparently attached to the voucher together with a schedule showing the cost of the Kearny County gas properties in excess of $47,633.71 "to be charged to Pielsticker in exact amount." These properties were not transferred to the N.C.R.A. and apparently were not included in the valuation of the properties for the purpose of determining the sale price for the stock sold to the N.C.R.A.

These properties were sold in contemplation of corporate dissolution. They were sold to Pielsticker admittedly

for Black's account, so that it may be said that Black was in reality the purchaser. We can see nothing inherently dishonest or fraudulent in Black's purchase of the corporate properties on dissolution provided that he paid full value therefor. The record shows that the cost basis for the Kearny County gas properties to the corporation was $47,633.71 and that they were sold to Pielsticker for Black's account for $39,449.78, but there is nothing in this record from which we can determine that the properties were worth more than their sale price. Indeed, there is nothing [fol. 2361] in the record to show or tending to show that any of the properties sold to Pielsticker were worth more than what he paid for them. But even so, they were sold by the corporation in pursuance of a resolution of the board of directors setting out the exact amounts for each of the properties sold. There was nothing secret or surreptitious about the transaction except the properties were bought by Pielsticker for Black's account, and while the reasons therefor do not appear, we think it immaterial if, as we have seen, the corporation received full value for the properties sold. It is significant, also, that the properties were sold after the N.C.R.A. had become the dominant stockholder and was in the process of dissolving the corporation. It was of no concern to the corporation who acquired the properties if full value was paid. No accounting on these particular transactions is indicated.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

[fol. 2362] PHILLIPS, Chief Judge, dissenting:

I respectfully dissent from that part of the opinion which holds that the receivers of the Black-Marshall Oil Company[1] were entitled to recovery in part on the corporate cause of action, for the reason that, in my opinion, the corporate cause of action was wholly barred by the Kansas statute of limitations and by laches.

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[1] Hereinafter referred to as BM.

In January, 1940, certificates of stock in BM were issued to Black, et al.[2] covering an aggregate of 64,870 shares. The original five directors of BM were Black and Marshall and three members of the Aledo group: Ives, Boyd and Stevenson. At the next annual meeting of the stockholders, held in January, 1941, Black and Marshall and five members of the Aledo group; namely, Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected to the board of directors. At the annual meeting of the directors, also held on January 17, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the board of directors authorized the issuance of 122,500 shares of common stock, which included the 64,870 shares of stock to Black and Marshall, in exchange for five leases and the assumption by the corporation of liability existing against the said leases in [fol. 2363] the amount of $8,827.93. At the next annual meeting of the board of directors, held in January, 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Allen James of the Chicago group, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Ranney of the Chicago group, an audit report for the year ending July 31, 1942, was examined and approved. That report also showed the issuance of the above mentioned stock. Like audit reports, examination and approval covering subsequent years were presented, examined and approved at stockholders' meetings held in January and December, 1944.

The minutes of the annual meeting of the stockholders of BM, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares. The same may be said

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[2] Marshall was the beneficial owner of approximately half of such stock.

with respect to the minutes of the stockholders' meeting, held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of stockholders held on December 6, 1944, the stockholders adopted a resolution authorizing a purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a [fol. 2364] like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons embraced in the Aledo group.

It seems to me that the written records referred to above conclusively establish that the directors and stockholders knew in December, 1944, and prior thereto that the 64,870 shares of stock had been issued to Black and Marshall in exchange for their interest in the Kansas leases.

The trial court found that the 64,870 shares were issued to Black, et al. for the partnership interest of Black and Marshall in the original five Kansas leases and that the corporate records reflected that fact.

The trial court, in addition to its specific findings of fact, found all other issues of fact in favor of the defendants and against the plaintiffs.

The corporate cause of action was commenced by the receivers on July 14, 1950, at least more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that the 64,870 shares had been issued to Black and Marshall.

For the reasons indicated, it is my opinion that the corporate cause of action, insofar as it was predicated on the issuance of such 64,870 shares of stock, was barred by the statute of limitations and by laches.

[fol. 2365] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—November 25, 1955.

(Vacated by order of May 4, 1956.)

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

[fol. 2418] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER WITHDRAWING OPINION FILED NOVEMBER 25, 1955, AND VACATING JUDGMENT ENTERED NOVEMBER 25, 1955.

Eighteenth Day, March Term, Friday, May 4th, 1956.

It is now here ordered by this court that the opinion of the court filed November 25, 1955, be and the same is hereby withdrawn, and that the judgment entered November 25, 1955, be and the same is hereby vacated.

NOTE RE FIRST PETITION FOR REHEARING

[Clerk's note: No order was entered on appellees' first petition for rehearing and request for rehearing en banc since the opinion filed November 25, 1955, was withdrawn.]

[fol. 2419] IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 4962, 4963, 4964—March Term, 1956.

A. M. AMEN ET AL., Appellants,

v.

WILLIAM H. BLACK, Appellee.

A. M. AMEN ET AL., Appellants,

v.

WILLIAM H. BLACK and RUTH F. BLACK, Appellees.

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, Appellants,

v.

WILLIAM H. BLACK and RUTH F. BLACK, Appellees.

Appeal from the United States District Court for the District of Kansas.

[fol. 2420] D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants;

Malcolm Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Foulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, Chief Judge; and MURRAH, Circuit Judge, and WALLACE, District Judge.

MURRAH, Circuit Judge.

OPINION—May 4, 1956.

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it. he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

[fol. 2421] The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23 (a)(3) of the Federal Rules of Civil Pro-

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OPINION—May 4, 1956.

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cedure, 28 U.S.C.A. The appellees challenge the propriety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdic- [fol. 2422] tional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry. Co.*, 40 F.Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." *Blazer* v. *Black*, 10 Cir., 196 F.2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold [fol. 2423] for an amount sufficient to yield the stockholders $10.00 per share; that the undeveloped properties of the company were being retained for development at a later propitious time; and that the stockholders should surrender fifty percent of their stock in order to bind the transaction.

The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were concededly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of [fol. 2424] course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. *United States* v. *United States Gypsum*, 333 U.S. 364; *United States* v. *Waymire*, 10 Cir., 202 F.2d 550; *McAllister* v. *United States*, 348 U.S. 19; *United States* v. *Oregon Medical Society*, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil.

The contracts in identical terms provided that Black would receive one-fourth of the profits from the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $21,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an auto- [fol. 2425] mobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois corporation with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00 and [fol. 2426] 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of com-

mon for every $2.00 invested and one share of preferred for every $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meeting in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas, where the company offices were maintained.

The productive leases in Kansas were developed from [fol. 2427] 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was considerable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing

that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few [fol. 2428] days later, Black wrote Ives outlining his negotiations with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal with the co-op". Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of

fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

[fol. 2429] When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $258,750.00 were transferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group, concerning the progress of the supposed sale, or for that matter, the progress of the company, until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by separate vouchers to each of the stockholders. At this point in the course of events Black had in his possession and in his [fol. 2430] lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for each producing well so drilled. The company continued to prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders agreeing to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the [fol. 2431] Black-Marshall Oil Company. From the total consideration of the sale of the stock to the N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors, and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan. Henceforward Black

became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group, and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

[fol. 2432] It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "although the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency §363; see also Restatement Agency §261; *Anheuser-Busch* v. *Grovier-Starr Produce Co.*, 128 F.2d 146; *Cox* v. *Pabst Brewing Co.*, 128 F.2d 468; *Siedhoff* v. *Campbell*, 141 Kan. 255, 40 P.2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency §362; see also Restatement Agency §§257, 258.

Moreover, the record shows without much doubt that [fol. 2433] Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives'

representations were brought home to Black.[1] In their brief the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." *Maryland Casualty Co.* v. *Beebe*, 54 F.2d 743, and cases cited. Black kept the stock [fol. 2434] with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot

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[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties of Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years". (b) In the early Fall of 1945 when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis, only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability [fol. 2435] rule, see *Blazer* v. *Black*, 10 Cir., 196 F.2d 139, or the less stringent rule applicable in Illinois, see *Agatucci* v. *Corradi* (Ill.), 63 N.E. 2d 630; *Dunnett* v. *Arn*, 10 Cir., 71 F.2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See *Auer* v. *Wm. Meyer Co., et al.*, 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur., Trusts, §§220, 225 and 226; *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80; *Manufacturers Trust Co.* v. *Becker*, 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his inequitable conduct. *Falk* v. *Hoffman* (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. *Dunnett* v. *Arn, supra*, at Page 920; *Blazer* v. *Black, supra*.

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that

which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon [fol. 2436] the equitable principle of unjust enrichment, not upon the theory of provable damages. *Dunnett* v. *Arn, supra; Blazer* v. *Black, supra; Falk* v. *Hoffman, supra.* In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were beneficially excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With respect to the parties falling within this category who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. [fol. 2437] We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member through Dr. Danford that both Amen and Baldwin were of the Aledo Group and a large stockholder. It was induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency §315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was [fol. 2438] credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of the company in proportion to their equitable stock holdings at the time of the sale along with the other appellants

as to whom the trial court found Ives made misrepresentations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

This brings us to the corporate claims, and more particularly to the right of Black to participate in the proceeds of the sale to the N.C.R.A. on the basis of the 32,457.50 shares of stock which the appellants contend should be denied participation because fraudulently issued to Black as a promoter's illegal secret profit.

[fol. 2439] Inasmuch as the appellants do not seek to set aside the 1947 sale of stock to the N.C.R.A. by Black, but rather to impress a trust upon the proceeds of the sale, and constitute Black as trustee therefor, they ceased to be either legal or equitable stockholders upon the consummation of the sale, and consequently have no capacity to maintain a derivative action on behalf of the corporation for the redress of corporate wrongs. This is true, even though the wrongs complained of were committed while they were either legal or equitable stockholders. *Hanna* v. *Lyon*, 71 N.E. 778; 3 Fletcher, Cyclopedia of Corporations, Sec. 1286, page 988.

And while the corporate receivers may have capacity to maintain the suit on behalf of the dissolved corporation because of the invulnerability of the order of the Illinois Federal Court setting aside the corporate dissolution; 16 Fletcher, Cyclopedia of Corporations, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; *Town of Vandalia et al* v. *St. Louis, V. & T.H.R. Co. et al* (Ill.), 70 N.E. 662; *Blanchard Bro. & Lane* v. *S. G. Gay Co. et al* (Ill.), 124 N.E. 616; *Miller* v. *Union State Inv. Co. et al* (Ill.), 61 N.E. 2d 764; *Badger* v. *Hoidale* (8th Cir.), 88 F.2d 208; yet equity, looking at the substance of the proceedings, will make sure that the beneficiaries of the corporate redress are equitably entitled to the fruits of its processes. In the language of Judge Pound in *Home Fire Ins. Co.* v. *Barber, et al* (Nebr.), 93 N.W. 1024, 1033: ". . . . When [fol. 2440] the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceedings, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality,

and apply the principles of equity to reach an inequitable result."

Looking at the substance of the corporate claims and the beneficiaries thereof, it becomes readily apparent that the principal beneficiary of any recovery on behalf of the corporation would be the N.C.R.A. who became the principal stockholder upon the purchase of a majority of the stock in 1947. And having purchased the stock of the corporation from Black in an arms length transaction, and having received the full value of its purchase, any recovery as stockholder beneficiary of the dissolved corporation would be tantamount to recoupment of the legitimate purchase price of the stock. Obviously there are no equities in such a result, and we therefore hold that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery. And see *Home Fire Ins. Co. v. Barber, supra.*

But the failure of the corporate claims in nowise militates against the standing of the former stockholders entitled to participate in the proceeds of the sale from contesting the right of Black or anyone else to participate in the fund which equity has created by raising a trust and constituting Black as trustee therefor ex malificio. The appellants, former stockholders, seek to set aside the [fol. 2441] issuance of 32,457.50 shares of stock to Black on the grounds that they were fraudulently issued to him, and thus recover the proceeds of the sale of that stock for themselves and those equitably entitled to participate therein. They sought relief through the medium of the corporation. But looking at the real parties in interest to the fund, equity will recognize the standing of the beneficiaries to contest the rights of others also claiming an interest by virtue of stock ownership at the time of the 1947 sale. The court has jurisdiction of the proceeds of the sale; it has jurisdiction of the parties; and Black is being required to account to the defrauded stockholders as equitable owners of the stock he sold to the N.C.R.A. as an incident to equitable accounting and the achievement of complete justice. The court may assuredly determine the rightful ownership of all the stock entitled to partici

pate in the proceeds of the 1947 sale, and in so doing, it will not be restrained by mere forms of action or niceties of pleadings. See 30 C.J.S., Equity, §§67 and 68, pp. 414-421; 19 Am. Jur., Equity, §127, page 126.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939, Black discussed with Ives his plan to organize a corporation so that they could operate "as a company instead of an an individual". In November of 1939, Black proposed to the board of directors of Landowners As- [fol. 2442] sociation to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corporation in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of

[fol. 2443] the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who repasted them in the stock book. The stubs were not in secretary-Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders' meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a notation "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated, "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were issued to him and Marshall in consideration of the trans-[fol. 2444] fer of the five Barton County oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We

do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the record is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1949 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $28,415.00 expended. $8,000.00 [fol. 2445] ($3,000.00 for the Krier lease and $5,000.00 on a drilling contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organization of the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

Nor do we believe that the asserted claims are barred by the Kansas statute of limitations or analogous laches. Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two

years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." *Sauberli* v. *Sledd* (Kan. 1936), 55 P.2d 415, 419, [fol. 2446] and cases cited; *Dalton* v. *Hill* (Kan. 1950), 219 P.2d 710, 716; *Lewis* v. *Duncan* (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in *Blazer* v. *Black*, 196 F.2d 139, 137. See *Dalton* v. *Lawrence Nat. Bank* (Kan. 1950), 219 P.2d 719; *Guilfoyle* v. *Brown* (Kan. 1939), 88 P.2d 1082; *Hughes* v. *Reed* (10 Cir.), 46 F.2d 435; *Curtis* v. *County*, 257 U.S. 260, 66 L.Ed. 222, 42 S.Ct. 100; Anno., 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, §59, page 55.

The record is conclusive that the appealing shareholders did not personally have knowledge of the perpetrated fraud and equally convincing that the individual appellants cannot be charged with having failed to use due diligence to discover such fraud. In determining whether reasonable diligence was exercised for the purpose of discovering fraud, one of the most important determinants is the relationship of the parties. As we have seen, the record conclusively establishes a fiducial relationship between Black and the appellants as former stockholders. And the law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty [fol. 2447] of the party committing the fraud to disclose the truth to the other. *Auer* v. *Wm. Meyer Co.* (Ill. 1944), 54 N.E. 2d 394. Cf. *Michelsen* v. *Penney* (2d Cir.), 135 F.2d 409. In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made." *Dalton* v. *Hill*, 219 P.2d 710,

716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." *Connell* v. *Saco Oil Co.*, 223 P.2d 1020, 1027. See also *Dalton* v. *Laurence Nat. Bank, supra.*

The successful appealing shareholders are entitled to money judgments against Black equal to the values of their equitable stock holdings in Black-Marshall sold to N.C.R.A. in 1947, less sums already received for such interests.

To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder [fol. 2448] in the fraudulent 1944-1945 transactions.

Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

PHILLIPS, Circuit Judge, dissenting in part:

Plaintiffs below have appealed from a single judgment adverse to them, entered in three cases, which had been consolidated for trial.

On June 28, 1949, Amen commenced an action in the United States District Court for the District of Kansas, numbered 3495 on the Docket of such court, against William H. Black and Dale G. Ives. There were other defendants whose presence as parties is no longer material.

The action was brought as a class action for the benefit of Amen and all other stockholders of the Black-Marshall [fol. 2449] Oil Company, an Illinois corporation, hereinafter called the B-M Company, similarly situated. Certain former stockholders in the B-M Company intervened. In an amended complaint it was alleged that Black and Ives entered into a conspiracy to acquire the stock and assets of the B-M Company for Black's own use and benefit; that Black and Ives falsely represented to the plaintiffs that a sale of a large portion of the assets of the B-M Company had been arranged for an amount equal to $11 per share; that certain undeveloped oil and gas leases of the B-M Company would not be included in the sale, but would be retained for the benefit of the stockholders of the B-M Company; that induced by such false representations the plaintiffs, in 1944 and 1945, endorsed in blank and delivered to Black and Ives stock certificates representing their respective shares in the B-M Company and received therefor $11 per share; that Black and Ives effected a sale of the stock and assets of the B-M Company to the National Cooperative Refinery Association, hereinafter referred to as the Co-operative Association, at a price, which, when prorated among the shareholders of the B-M Company, excluding the plaintiffs, resulted in a distributive portion per share substantially in excess of the price paid by Black and Marshall to the plaintiffs for their shares. The plaintiffs did not learn of such fraudulent conspiracy and acts until May, 1949. The plaintiffs prayed for the recovery of their proper and lawful distributive shares of the purchase price paid by the Co-operative Association for stock in the B-M Company.

[fol. 2450] It was further alleged in the amended complaint that Black caused to be issued to himself for his benefit, at the time of the original issue of the stock of the B-M Company, shares of stock for which Black gave

no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for his own use and benefit and employed B-M Company funds to finance his personal business ventures. For the alleged wrongs to the corporation, Amen and the interveners prayed for relief on behalf of the corporation.

On September 25, 1950, Walker and Windish, co-receivers of the B-M Company, filed a complaint in intervention in No. 3495 in which they alleged that Black, at the time of the original issue of stock in the B-M Company, caused to be issued and transferred to him shares in the B-M Company for which he paid no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for purposes other than proper corporate purposes and for his own use and benefit and to finance his personal business ventures for his personal profit. The co-receivers prayed for relief on behalf of the corporation.

On July 14, 1950, the co-receivers filed an action in the United States District Court for the District of Kansas, numbered W-143 on the docket of such court, against William H. Black, in which they alleged substantially the same facts as they had alleged in the intervening petition in No. 3495, and sought redress from the defendant on account of the stock alleged to have been issued to [fol. 2451] Black without consideration and the use of funds of the B-M Company by Black for his personal benefit.

Prior to July 15, 1949, Amen, Wadleigh, Danford, Robinson, Hall and Riley commenced an action in the District Court of McPherson County, Kansas, against William H. Black and other defendants, whose presence as parties is no longer material. The action was brought for the benefit of the plaintiffs and all other stockholders of the B-M Company similarly situated. On the date last mentioned, such action was removed by the defendant to the United States District Court for the District of Kansas, where it was numbered 3509 on the docket of that court. On July 25, 1950, an amended complaint was filed in No. 3509, which alleged essentially the same facts as those alleged in the amended complaint in No. 3495.

Thus, it will be seen that in No. 3495 and No. 3509 certain former stockholders in the B-M Company, either as parties plaintiff or as interveners, sought relief in their individual behalf from William H. Black on account of the alleged fraudulent representations that a sale of the assets of the B-M Company had been effected, whereby they were induced to deliver their stock endorsed in blank to William H. Black, who subsequently sold such stock to the Cooperative Association at a much larger price per share. They, in effect, affirmed the sale of their stock to Black and prayed that Black be required to account for the moneys he received from the sale of the stock of plaintiffs and interveners to the Cooperative Association. It will be [fol. 2452] further observed that the plaintiffs and interveners in No. 3495 and No. 3509 undertook to join with their original action a stockholders' derivative action in which they sought to recover on behalf of the B-M Company for the injuries to the B-M Company alleged to have resulted from the issue of stock to Black without consideration and the alleged use by Black of the corporate funds for his personal benefit.

At the close of plaintiffs' evidence in the trial below, the co-receivers who had intervened in No. 3495 elected to stand upon their action No. W-143 for redress of the alleged wrongs to the B-M Company.

Many of the individual plaintiffs and interveners in No. 3495 and No. 3509 resided in, or in the vicinity of Aledo, Illinois, and may be referred to as the Aledo Group.

Involved in the consolidated actions were four claims:

1. The claim of the Aledo Group against William H. Black, predicated on the alleged false representations of Black, acting through his agent, Ives, to recover the amount that Black received from the sale of the stock of the Aledo Group to the Cooperative Association in excess of the $10 and $12 per share, respectively, which the Aledo Group received from their stock;

2. The claim in the nature of a derivative action by the original stockholders and an original action by the co-receivers to recover on behalf of the corporation on account of 32,457.5 shares of stock alleged to have been is-

[fol. 2453] sued to Black without consideration and sold by him in 1947, to the Cooperative Association for $51.06 a share;

3. A claim asserted by the co-receivers for recovery of profits alleged to have been realized by Black from the use of B-M Company funds in personal business ventures; and

4. The claim of the co-receivers for profits realized by William H. Black for transactions in which B-M Company funds were used for Black's personal profit.

That Ives made the alleged false representations with respect to the sale of the assets of the B-M Company to members of the Aledo Group is conceded. The trial court found that such representations were made by Ives without solicitation by William H. Black and without the knowledge of William H. Black. However, Black testified that he told the Aledo Group that Ives was his agent in all matters with respect to the B-M Company, and especially for the purpose of furnishing information to the Aledo Group. Therefore, it is my opinion that Black was estopped to deny Ives' agency and that Ives had apparent or ostensible authority to furnish information on Black's behalf to the Aledo Group with respect to the B-M Company and that the representations made by Ives to the Aledo Group were within the scope of the apparent or ostensible authority of Ives and Black was bound thereby.[1] On that ground and that ground alone, I concur in the majority opinion, insofar [fol. 2454] as it reversed the judgment below, with respect to the claim of the Aledo Group to recover from William H. Black for the injuries suffered by the Aledo Group on Account of the alleged false and fraudulent representations of Ives.

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[1] Faber-Musser Co. v. William E. Dee Clay Mfg. Co., 291 Ill. 240, 126 N. E. 186; 2 CJS. Agency, §96, pp. 1205-1220; See also: Anheuser-Busch v. Grovier-Starr Produce Co., 10 Cir., 128 F. 2d 146; Greep v. Burns, 160 Kan. 48, 159 P. 2d 803; Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404; Nelson Development Co. v. Ohio Oil Co., 45 F. Supp. 933; Spann v. Commercial Standard Ins. Co. of Dallas, Texas, 8 Cir., 82 F. 2d 593; Metropolitan Life Ins. Co. v. Henderson, 9 Cir., 92 F. 2d 488, c. d. 311 U. S. 697; Roth v. Hyer, 5 Cir.; 133 F. 2d 5, c. d. 318 U. S. 782.

The majority opinion affirms the judgment below, with respect to the third and fourth claims. It also affirms the judgment below, with respect to the derivative stockholders' action (Claim Two) and the claims asserted by the co-receivers in cause No. W-143. However, on a theory which, in my opinion, has neither basis in law nor justification in equity, the majority opinion holds that the Aledo Group may obtain redress against William H. Black for the wrong alleged to have resulted to the corporation from the issuance to William H. Black of the 32,457.5 shares of stock.

The Petroleum Investment Company was a partnership or a joint venture, formed in 1938. Its members were Black, Ives and the members of the Aledo Group. From $21,000 invested in the venture by members of the Aledo Group, nine dry holes were drilled in Illinois and Indiana. That unsuccessful venture was completed in early 1939. Thereafter, in the spring of 1939, William H. Black and D. J. Marshall formed a partnership, which thereafter ac-[fol. 2455] quired five oil and gas leases in Kansas. That partnership drilled a well on a lease known as the Esfeld lease, which came in as a producer in July, 1939, and established such lease as one of the most valuable leases in the State of Kansas. The funds for acquiring the lease and drilling and equipping such well were furnished by Black and Marshall, with the exception of $9,000, which Black borrowed on his own credit and which was ultimately assumed by the B-M Company.

Up to August 23, 1939, the Aledo Group made no advancements of funds to the Black-Marshall partnership. After the Esfeld lease had been developed as a commercial producer and from August 23, 1939, to December 7, 1939, the Aledo Group advanced to the partnership $17,650 and Black advanced $28,415. Subsequent to the latter date, the Aledo Group advanced additional funds, both before and after the incorporation of the B-M Company, to carry on the development of the Kansas leases.

The first meeting of the incorporators of the B-M Company was held in Aledo, Illinois on January 11, 1940. The minutes of that meeting recite that the chairman presented a subscription agreement bearing subscriptions for 122,500 shares of common stock and 9,055 shares of preferred

stock of the B-M Company and that a resolution was unanimously passed accepting such subscriptions on behalf of the corporation. At the same meeting a proposal was presented from the Landowners Oil Association, owned by a Chicago, Illinois group, to exchange at least 75 per cent of the outstanding stock of Landowners for 20,000 shares [fol. 2456] of common stock and 2,000 shares of preferred stock of the B-M Company and that a resolution was adopted approving such proposal.

The five Kansas leases were assigned to the B-M Company in exchange for the entire subscription of 122,500 shares of common stock and 9,055 shares of preferred stock. Undoubtedly, it was originally contemplated that 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Black and 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Marshall, but it developed that Black and Marshall were unwilling to assign the leases to the B-M Company, unless they received, in addition to the 20,000 shares of common stock and 2,000 shares of preferred stock, 64,870 shares of common stock.

Black signed the stock certificates in blank. The certificates for 64,870 shares made out to Black, et al. (The omission of Marshall's name was for reasons personal to Marshall) were not signed by Ives and not actually delivered to Black and thereafter Ives reissued such stock to Black and Marshall at about the time of the stockholders' meeting January 1, 1941, to enable Black to transfer to members of the Aledo Group a portion of such shares, which they had purchased from Black. While Black admitted he could not explain why Ives failed to sign the original certificates made out to Black, et al., his testimony made it very clear that Black and Marshall were unwilling to assign the Kansas leases for 20,000 shares of common stock and 2,000 shares [fol. 2457] of preferred stock.

Common stock was issued to the investors in the Petroleum Investment Company on the basis of one share of common for each $2.00 invested, and one share of preferred for each $4.00 invested, both in the Illinois venture and by advancements to the Black-Marshall partnership in Kansas.

Certainly, Marshall was under no obligation, legal or moral, to bail the Aledo Group out from their non-profitable venture in Illinois. No wrongdoing by Black with respect to the Illinois venture was claimed, and it follows that Black was under no legal or moral duty to aid the Aledo Group in recouping their losses in the Illinois venture. Under all the facts and circumstances, it is a reasonable inference that Black and Marshall would be unwilling to assign the Kansas leases in exchange for 20,000 shares of common stock and 2,000 shares of preferred stock.

The original five directors of B-M Company were Black, Marshall and three members of the Aledo Group: Ives, Boyd and Stevenson. At the second annual meeting of the stockholders of the B-M Company, held in January, 1941, Black and Marshall and five members of the Aledo Group; Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected as directors of the B-M Company. At the annual meeting of the directors, held on January 7, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the Board of Directors authorized the issuance of 122,500 shares of common stock, including [fol. 2458] the 64,870 shares of stock issued to Black and Marshall in exchange for five leases and the assumption by the corporation of liability existing against the said leases in the amount of $8,827.93. At the next annual meeting of the board of directors, held in 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Group and Allen James of the Landowners Corporation, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above-mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Group and Ramey of the Landowners Corporation, an audit report for the year ending July 31, 1942, was examined and approved. The report also showed the issuance of the above-mentioned stock. Like audit reports covering subsequent years were presented, examined and

approved at stockholders' meetings, held in January and December, 1944.

The minutes of the annual meeting of the stockholders of the B-M Company, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares of B-M Company common stock. The same is true with respect to the minutes of the stockholders' meeting, held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of the stockholders, held on December 6, 1944, the stockholder adopted a resolution au-
[fol. 2459] thorizing the purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons who were members of the Aledo Group.

The trial court found that Black and Marshall were issued 20,000 shares of common stock, 2,000 shares of preferred stock, and an additional 64,870 shares of common stock in exchange for the Kansas leases and that the corporate records reflected these facts.

That the corporate records reflected such facts was established by uncontroverted written evidence. That such stock was issued to Black and Marshall in exchange for an assignment of the Kansas leases was unequivocally testified to by Black.

Since the trial judge has the opportunity of observing a witness while testifying and his demeanor on the witness stand, ordinarily the questions of the credibility of the witness and the weight to be given his testimony are peculiarly questions for determination by the trial court.[2]

Under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court may not set aside findings of fact [fol. 2460] by a trial court, unless clearly erroneous, and

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[2] Zimmer v. Acheson, 10 Cir., 191 F. 2d 209, 212; Brown v. American National Bank, 10 Cir., 197 F. 2d 911, 914.

due regard must be given to the opportunity of the trial court to judge the credibility of witnesses. When there is evidence to support a finding, the reviewing court may not set it aside as clearly erroneous, unless, on a consideration of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed.[3]

Under the existing facts and circumstances, it would have been strange, indeed, if Black and Marshall would have been willing to have transferred to the B-M Company the Esfeld lease, the large value of which already had been established by development, and the other four leases, which gave much promise, for 20,000 shares of common stock and 2,000 shares of preferred stock in the B-M Company.

I think it may not be said that this court, on a consideration of the entire evidence, is left with the definite and firm conviction that the finding of the trial court, last above adverted to, was clearly erroneous.

I will now assume, without conceding, that the 32,457.5 shares, one-half of the 64,870 shares issued to Black and Marshall, were issued to Black without consideration. If that occurred, the wrong was a wrong to the B-M Company, the corporation, and not a wrong to its stockholders, al- [fol. 2461] though they might suffer indirectly because thereof. It gave rise to a claim which only the corporation could assert, or the stockholders in a proper case as a derivative action. In legal effect a derivative action by a stockholder or stockholders is one conducted by a stockholder or stockholders as the corporation's representative.[4]

The stockholder is only a nominal plaintiff. The corporation is the real party in interest.[5]

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[3] United States v. United States Gypsum Co., 333 U. S. 364, 395; H. F. Wilcox Oil & Gas Co. v. Diffie, 10 Cir., 186 F. 2d 683, 696.

[4] Eriksson v. Boyum, 150 Minn. 192, 184 N. W. 961, 963; Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516. Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5939.

[5] Thomson v. Mortgage Inv. Co., 99 Cal. App. 205, 278 P. 468, 471; Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39; Hayden v. Perfection Cooler Co., 227 Mass. 589, 116 N. E. 871, 872; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5939.

Where the plaintiff does not seek to enforce relief for the benefit of the corporation, it is not derivative.[6]

Unless otherwise provided by statute, a stockholders' derivative action is always one in equity.[7]

In a derivative action the stockholder stands in the corporation's shoes and must base his action on the corporation's rights and a wrong to it.[8]

[fol. 2462] A stockholder cannot sue unless there is, at the time he brings the suit, a cause of action which could be instituted by the corporation if it so desired.[9]

The relief granted will be exactly the same as the corporation might have had if it had been plaintiff.[10]

Any recovery belongs to the corporation. Direct relief to the stockholders cannot properly be granted.[11]

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[6] Spear v. H. V. Greene Co., 246 Mass. 259, 140 N. E. 795, 798; Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 253, 263; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §§5939, 5908.

[7] Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 253, 263; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5944.

[8] Lawrence v. Southern Pac. Co., 180 F. 822, 825; Turner v. Markham, 155 Cal. 562, 102 P. 272, 275; Caldwell v. Eubanks, 326 Mo. 185, 30 S. W. 2d 976, 980; Walters v. Horace Waters & Co., 201 N. Y. 184, 94 N. E. 602, 604; Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5947.

[9] Kessler v. Ensley Co., 123 F. 546, 550, c. d. 205 U. S. 541; Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39; Seitz v. Michel, 148 Minn. 80, 181 N. W. 102, 105; Cochran v. Shetler, 286 Pa. 226, 133 A. 232, 234; Outing v. Plum, 212 Iowa 1169, 235 N. W. 559, 560; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5947.

[10] Collins v. Penn-Wyoming Copper Co., 203 F. 726, 729; Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516; Reid v. Robinson, 64 Cal. App. 46, 220 P. 676, 680; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §6027.

[11] Jacobs v. First Nat. Bank of Shreveport, 35 F. 2d 227, c. d. 284 U. S. 634; Joyce v. Congdon, 114 Wash. 239, 195 P. 29, 30; Caldwell v. Eubanks, 326 Mo. 185, 30 S. W. 2d 976, 980; Harris v. Pearsall, 116 Misc. Rep. 366, 190 N. Y. S. 61, 75; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §6028.

Any defense, affirmative, or for want of facts, that would be good if the corporation itself was plaintiff is also good in a stockholders' derivative action.[12]

A judgment against the corporation in an action brought by it involving the same subject matter ordinarily is a defense to a derivative action.[13]

The majority holds that the Aledo Group could not maintain the derivative action and that the co-receivers could not maintain a direct action for the benefit of the corpora- [fol. 2463] tion on account of the alleged issue to Black of the 32,457.5 shares of stock for reasons set forth in the majority opinion.

The action by the co-receivers, cause No. W-143, was commenced more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that 64,870 shares of stock in the B-M Company had been issued to Black and Marshall, purportedly in exchange for transfer of the Kansas leases.

Section 60-306, G.S. Kan. Anno. 1949, in part provides:

> "*Third.* Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Even if it can be said to be an action for fraud, the suit must have been commenced within two years after the discovery of such facts as could on reasonably diligent inquiry or investigation lead to the knowledge of the fraud.[14]

It seems clear to me that the corporate action was barred [fol. 2464] by the Kansas statute of limitations. Likewise,

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[12] Kessler v. Ensley Land Co., 148 F. 1019, 1020, c. d. 205 U. S. 541; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, §5859.

[13] Hawkins v. Glenn, 131 U. S. 319, 329.

[14] See City of Coffeyville v. Metcalf, 184 Kan. 361, 5 P. 2d 807, 810; Woodworth v. Kendall, 172 Kan. 332, 239 P. 2d 924, 926.

it is clear that on June 28, 1949, when the derivative action was commenced, an action brought by the corporation would likewise have been barred by the Kansas statute of limitations.

Under facts clearly established in the evidence, it certainly is beyond the realm of possibility that the Aledo Group, as stockholders, and a portion of them as directors, did not know, at least more than four years from the time the first of the actions was commenced, all of the facts with respect to the issuance of the 64,870 shares of stock to Black and Marshall.

Applying the statute of limitations by analogy, the derivative action was clearly barred by laches.

If the 32,457.5 shares of stock were wrongfully issued to Black, a like amount of the stock was wrongfully issued to Marshall, yet the Aledo Group, in 1944, not only knew of the issuance of such stock to Marshall, but they joined as stockholders and a portion of them as directors in the adoption of resolutions which ultimately resulted in the purchase of such stock from Marshall, thus acquiescing in the original issue of stock to Black and Marshall.

The majority, conceding that neither the corporate action nor the derivative action may be maintained, hold that certain persons who compose only a portion of the stockholders at the time of the alleged wrongful issue of such stock to Black, but who are no longer stockholders in the corporation, may recover the indirect or consequential damages [fol. 2465] suffered by them on account of the wrongful issue of such stock. They thus permit recovery by a limited group of former stockholders for a wrong done to the corporation, which resulted not only in indirect injury to such former stockholders, but to other stockholders, such as the Landowners Association and their successors.

If the 32,457.5 shares of stock issued to Black were, in fact, issued without consideration in 1940, the wrong was a primary wrong to the corporation, which resulted in indirect injury to all of the stockholders of the B-M Company at that time.

Since the wrong complained of was a wrong to the corporation, resulting in immediate and direct injury to it and only indirect or consequential damage to all of the

stockholders, a stockholder or stockholders could not maintain an individual action to recover damages for such wrong.[15]

A stockholder cannot maintain an action in his own name and in his own behalf to recover loss resulting from depreciation of the value of his stock caused by an injury to the corporation itself.[16]

[fol. 2466] It is only when the injury to the shares of the stockholder is peculiar to him alone and does not fall alike upon other stockholders that he can recover as an individual.[17]

The theory upon which such relief is given by the majority opinion to the Aledo Group is contrary to the theory of recovery for such alleged wrong set forth in the pleadings and to the theory upon which the case was presented, both in the trial court and in this court.

For the reasons indicated, I respectfully dissent from that portion of the opinion which directs the granting of relief to the Aledo Group, because of the issuance of the 32,457.5 shares of stock to Black.

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[15] Seitz v. Michel, 148 Minn. 80, 181 N. W. 102, 105; Wells v. Dane, 101 Me. 67, 63 A. 324, 325, 326; Niles v. New York Cent. & H. R. R. Co., 176 N. Y. 119, 68 N. E. 142, 144; White v. British Type Investors, 130 N. J. Eq. 157, 21 A. 2d 681, 683.

[16] Green v. Victor Talking Mach. Co., 24 F. 2d 378, 380, c. d. 278 U. S. 602; Stinnett v. Paramount-Famous Lasky Corp., 37 S. W. 2d 145, 149; Bartlett v. New York, N. H. & H. R. R. Co., 221 Mass. 530, 109 N. E. 452, 453; Caldwell v. Eubanks, 326 Mo. 185, 30 S. W. 2d 976, 980; Niles v. New York Cent. & H. R. R. Co., 176 N. Y. 119, 68 N. E. 142, 144; Baillie v. Columbia Gold Mining Co., 86 Ore. 1, 166 P. 965, 969; 18 CJS, Corporations, §559, p. 1272.

[17] Oliphant v. Woodburg Coal & Mining Co., 63 Iowa 332, 19 N. W. 212, 214, 215; Dudley v. Armenia Ins. Co., 115 App. Div. 380, 100 N. Y. S. 848, 820.

[fol. 2467] In United States Court of Appeals for the Tenth Circuit

Judgement—May 4, 1956

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

Order Denying Appellees' Petition for Rehearing En Banc.—June 19, 1956

These causes came on to be heard on the application of appellees for rehearing en banc.

On consideration whereof, it is ordered that the said application for rehearing en banc be and the same is hereby denied.

[fol. 2566] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 2567] Supreme Court of United States
No. 346, October Term, 1956

Order Allowing Certiorari—Filed November 5, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to question 1 presented by the petition for the writ which reads as follows:

> "1. A question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and

fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervener or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship."

Mr. Justice Reed took no part in the consideration or decision of this application.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 346

Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM H. BLACK and RUTH E. BLACK,

Petitioners

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; F. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES; infants under the age of twenty-one years, by Lois L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; Co-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AUGUST, 1956.

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Supreme Court of the United States

OCTOBER TERM, 1956

No. —

WILLIAM H. BLACK and RUTH F. BLACK,

Petitioners,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, William H. Black and Ruth F. Black,[1] pray that a Writ of Certiorari issue to review the judg-

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[1] Throughout this Petition, "petitioner" when used in the singular refers to William H. Black, who is the only petitioner whose actions are presently involved in the case and is the only petitioner against whom the court below said respondents would be entitled to judgment (Appendix, p. 68).

Petitioner prevailed below as to one appellant, McBride, on the individual causes (Appendix, pp. 62-63), and as to the co-receivers on all corporate causes (Appendix, p. 64). McBride and the co-receivers are listed as respondents solely because the judgment of the Court of Appeals (Appendix, p. 82) reverses the trial court without setting forth separately the portions of the litigation in which petitioner prevailed. Therefore, in this Petition "respondents" refers to the individuals who prevailed in the court below.

ment of the United States Court of Appeals for the Tenth Circuit entered on May 4, 1956 (Appendix, p. 82). The judgment by a divided court (Chief Judge Phillips dissenting in part) reversed findings of fact and the judgment of the United States District Court for the District of Kansas in favor of petitioners (defendants in the District Court) dismissing the causes. The Court of Appeals remanded the causes with instructions for the District Court to determine the amount each respondent was to recover from petitioner.

The litigation involves three separate actions, in which federal jurisdiction can be founded solely in diversity of citizenship, which were consolidated for trial in the District Court. Two of the actions held to be spurious class actions under Rule 23(a)(3) of the Rules of Civil Procedure—in which numerous of the respondents were permitted to intervene without alleging or meeting federal jurisdictional requirements—charged that the complainants suffered losses through fraudulent representations made by an alleged agent of petitioner in the course of a business venture.

OPINIONS BELOW

The District Court's findings of fact, conclusions of law, and judgment (Appendix, p. 1) are not reported. The opinion of the Court of Appeals for the Tenth Circuit entered November 25, 1955 (Appendix, p. 20, dissenting opinion at p. 47), and withdrawn May 4, 1956 (Appendix, p. 49), is not reported. The new opinion of the Court of Appeals (Appendix, p. 50, dissenting opinion at p. 69) is reported at 234 F. 2d 12.

JURISDICTION

The first judgment of the Court of Appeals was entered November 25, 1955 (Appendix, p. 49). Petition for Rehearing was filed December 15, 1955 (R. 2413). On May 4, 1956, the Court of Appeals withdrew its opinion, vacated its judgment, entered a new judgment and delivered a new opinion (Appendix, pp. 49, 50, 82). Petition for Rehearing, filed May 24, 1956 (R. 2522) was denied June 19, 1956 (R. 2565). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. A question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervener or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship.

2. After a trial consuming close to a month, in which the court heard over 35 witnesses including petitioner (defendant in the trial court), who testified for a full week, the trial court made findings of fact in favor of petitioner on the key issues involved. The second question presented is whether the Court of Appeals, in overturning these carefully documented findings in the face of Rule 52(a) of the Federal Rules of Civil Procedure, and then proceeding on the basis of its own factual determinations to misapply substantive law, so disre-

garded the rules of appellate review and the function of a Federal Court of Appeals as to require reversal by this Court.

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, . . . between Citizens of different States; . . ."

Rule 23(a)(3) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Rule 23. Class Actions
>
> "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is . . .
>
> * * *
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Rule 52. Findings by the Court
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

STATEMENT

There were three actions in the courts below, consolidated for trial and appeal, all alleging in essence that petitioner was engaged in a conspiracy to defraud. The actions were brought by alleged victims of this conspiracy as follows:

(1) In the Federal District Court in Kansas by Amen, a citizen of South Dakota, on behalf of all stockholders of the Black-Marshall Oil Company (Black-Marshall), an Illinois corporation, against petitioners, citizens of California, Black-Marshall, and several others.

(2) In the Kansas state court by Amen and five other former stockholders of Black-Marshall, also on behalf of all stockholders, against petitioners, Black-Marshall and several others. This case was removed by petitioners to the Federal District Court in Kansas.[2]

(3) In the Federal District Court in Kansas by the co-receivers for Black-Marshall (who also intervened in the foregoing suits) against petitioners.

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[2] The case was removed without objection, although five of the plaintiffs were Illinois citizens and defendant Black-Marshall was an Illinois corporation. In this regard, the petition for removal had stated that the corporation had not yet been served and that there was therefore diversity of citizenship between plaintiffs and defendants upon whom service had been obtained (R. 37-38).

In the first two actions many other former stockholders of Black-Marshall were permitted to intervene without being required to allege or meet federal jurisdictional requirements, and the co-receivers in the third action were permitted to intervene in these two actions.

The claimed fraud was: *as to the individual plaintiffs,* that in 1944 and 1945 petitioner and one Ives, through fraudulent representations, induced respondents to sell their Black-Marshall stock to petitioner at $10 and $12 a share, an amount less than the value of the stock or the pro rata portion of the assets represented by such stock, that petitioner at the time had an assured sale at a higher price for all the stock or assets of Black-Marshall, and that the stock was later sold at a higher price to the National Cooperative Refinery Association (NCRA); *as to the individual plaintiffs on behalf of the corporation and as to the co-receivers,* that petitioner caused to be issued to himself some 32,000 shares of Black-Marshall stock for no consideration, which shares were sold to NCRA in 1947. (In the trial court, respondents asserted that the value of their individual recovery should be in excess of $1,000,000, and that the value of the corporate cause relating to the 32,000 shares also exceeded $1,000,000 (R. 98-99, 108-109).)

The causes of action were tried without a jury before Hon. Delmas C. Hill of the United States District Court for the District of Kansas. After a trial which consumed nearly a month during which 37 witnesses testified, and with the benefit of briefs and suggested findings on behalf of all parties, Judge Hill entered his Findings of Fact and Conclusions of Law on April

1, 1954 (Appendix, p. 1). Among these were: that the evidence did not establish that there was any conspiracy by petitioner with Ives or anyone; that the evidence did not establish that Ives was petitioner's agent; that the evidence did not establish that petitioner was guilty of any fraud, practiced any fraud on the plaintiffs, or made any fraudulent misrepresentations to any of the plaintiffs; that plaintiffs received full value when they sold their shares and that the subsequent increase in value of the stock resulted from a successful drilling program and a substantial increase in the price of oil; that the stock received by petitioner on the incorporation of Black-Marshall, including the 32,000 shares, was in consideration of transfer to the company of his interest in valuable oil leases; and that Black-Marshall and its stockholders in June of 1947 ratified petitioner's balancing of accounts with Black-Marshall. Judge Hill thereupon dismissed the actions of the individual plaintiffs and the action of the co-receivers, and ordered judgment entered for the petitioners in all actions.

This judgment was reversed by the United States Court of Appeals for the Tenth Circuit in an opinion filed May 4, 1956 (replacing one by the same court filed on November 25, 1955). The majority of the panel (consisting of Circuit Judge Murrah and District Judge Wallace, with Chief Judge Phillips dissenting on all but one of the factual issues) determined, notwithstanding the trial judge's findings and conclusions, *that as to the individual causes,* petitioner planned the acquisition of the shares, knew of Ives's misrepresentations, concocted a scheme to defraud, and was a constructive trustee holding the proceeds of the 1947 sale of his

own stock in trust for these individuals.[3] The Court of Appeals did not dispute the findings of the trial court that respondents' stock was purchased for its full value at the time of sale and that the later increase in value of the stock came from causes unconnected with any purported misrepresentations made to induce the sale. *As to the corporate causes,* the majority below held that the 32,000 shares issued to petitioner were promotional stock issued "surreptitiously, covertly, and we say fraudulently" to petitioner, but that the corporate action, as such, must fail for lack of standing to sue. Nevertheless, the failure of the corporate claims was held by the court below ("on a theory, which," according to Chief Judge Phillips, "has neither basis in law nor justification in equity" (Appendix, p. 73)) not to preclude the individuals from obtaining redress against the petitioner for the wrong alleged to have resulted to the corporation from the issuance of these 32,000 shares of stock.

REASONS FOR GRANTING THE WRIT

I

IN HOLDING THAT A LITIGANT MAY INTERVENE IN A SO-CALLED SPURIOUS CLASS SUIT IN A FEDERAL COURT "IRRESPECTIVE OF CITIZENSHIP OR AMOUNT CLAIMED" PROVIDED THE ORIGINAL PLAINTIFF IN THE ACTION POSSESSED THE REQUISITE DIVERSITY OF CITIZENSHIP AND JURISDICTIONAL AMOUNT, THE COURT BELOW CAME INTO CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND WITH AN APPLICABLE DECISION OF THIS COURT.

The citizenship of the parties, plaintiffs, and intervenors, is in considerable confusion, probably because,

[3] Chief Judge Phillips concurred in the decision holding petitioner liable to the individual respondents solely on the ground

under the law as conceived below, it was not regarded as important.[4] But two interveners as plaintiffs clearly appear to be citizens of California, as are the petitioners, defendants below. And Black-Marshall, which should be a necessary party in any event, assuming a derivative recovery as allowed by the Court of Appeals, is an Illinois corporation, and so has common citizenship with many of the respondents.

The Court of Appeals brushed aside consideration of jurisdictional defects, saying:

> "The original complaint [i.e., the complaint by Amen alone] alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent in-

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that Ives was petitioner's agent and petitioner was therefore responsible for Ives' misrepresentations. (Appendix, pp. 72-73.)

[4] In the trial court petitioners contested the right to bring these actions as spurious class suits under Rule 23(a)(3). Although they pointed out that the petitions of intervention did not contain any jurisdictional allegations, their argument was directed to the fact that the actions, at best, alleged individual frauds committed by the same person in a different manner and at different times. In the Court of Appeals, petitioners renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a), and therefore each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved." (R. 2407, 2494). The jurisdictional issue, of course, is necessarily in the case as it comes to this Court. See, *e.g.*, *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583.

terventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry Co.*, [70] F. Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448." (Appendix, p. 52).

This is the whole opinion upon this point. Under the limitations of the Constitution jurisdiction of a federal court is not so easily created. The Court of Appeals for the Second Circuit is explicit on this point, and its decision in *Steele* v. *Guaranty Trust Co. of New York*, 164 F. 2d 387 (2d Cir. 1947), is in direct conflict with the decision below. In the *Steele* case Judges Learned and Augustus Hand and Judge Frank had before them a case in which a complaint had been amended to permit the intervention as plaintiffs of four parties, three of whom could not show the requisite amount, and as to the fourth of which there was not the needed diversity of citizenship. The Court unanimously held that there was no federal jurisdiction as to these plaintiffs. "A proceeding under 23(a)(3) is," said the Court through Judge Frank, "in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." This decision has been followed in *Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo. 1952), and *Speed* v. *Transamerica Corp.*, 135 F. Supp. 176, 202 (D.Del. 1955).

Similarly the Courts of Appeals of the Seventh

Circuit and of the District of Columbia have declined to follow the rule enunciated in the decision below and have required interveners under Rule 23 (a)(3), in cases other than diversity cases, separately to establish the basis of jurisdiction. *Matlaw Corporation* v. *War Damage Corp.*, 164 F. 2d 281 (7th Cir. 1947), *cert. denied*, 333 U.S. 863; *Knowles* v. *War Damage Corp.*, 83 App. D.C. 388, 171 F. 2d 15 (1948), *cert. denied*, 336 U.S. 914; *cf. McGrath* v. *Tadayasu Abo*, 186 F. 2d 766, 770 (9th Cir. 1951), *cert. denied*, 342 U.S. 832.

The spurious class action is, of course, nothing more than a permissive joinder device. As such, its diversity jurisdiction requirements accordingly should be comparable to those of the usual suits in which many parties are joined. The familiar jurisdictional standards for these actions were considered by this Court in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583. There, the fact that one of the many plaintiffs suing to enjoin collection of the fees exacted by the California Caravan Act met the jurisdictional requirements was held to be of no aid to other plaintiffs. Without dissent, the Court announced that since the device of joinder simply enables several plaintiffs to assert separate and distinct, though identical, demands in a single suit, it followed that each of the several plaintiffs is bound to establish jurisdiction with respect to his own claim regardless of whether or not other parties have done so and "the suit should be dismissed as to those who fail to show that the requisite amount is involved." (306 U.S. at 590).

Judge Prettyman, in the *Knowles* case, *supra*, discussed the history and reasoning of the spurious class doctrine:

> "This type of action is spoken of as a 'spurious class action'. The members' interests may be several and not interdependent, although the remaining requisites of the true class action must be met. Their joinder is a matter of economy and efficiency on the part of courts and parties—an avoidance of a multiplicity of suits. Courts have possessed the power to afford and have afforded this remedy long before the adoption of the new Federal Rules of Civil Procedure. The joinder was and is a matter of discretion in the trial court. However, both at the earlier date and now, when the interests are separate but a joinder is permitted, each individual claim must equal or exceed $3,000 before the action can be prosecuted in a federal court. When the claims are separate, they cannot be aggregated to surpass this jurisdictional threshold." (171 F. 2d at 18).

The decision below allowing intervention in a spurious class action, without regard to diversity, rests on a theory advanced by Professor Moore a year before the *Gray* case was decided (2 Moore, *Federal Practice* 2241-42 (1st ed. 1938), and resubmitted by him without any attempt to distinguish the effect of the *Gray* opinion (3 Moore, *Federal Practice* 3443-44 (2d ed. 1948)).

The sole authority cited by Professor Moore in his first edition, 2 Moore, *Federal Practice* 2241-42 and n. 24, was *Stewart* v. *Dunham,* 115 U.S. 61, a creditor's bill to set aside a fraudulent conveyance. The reasoning in the *Stewart* opinion itself negatives the extension of the case to a spurious class situation:

"The right of the court to proceed to decree between the appellants and the new parties did not depend upon the difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and *it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree.* If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." (115 U.S. at 64). (Emphasis supplied).

In a spurious class action, however, as Moore himself recognizes, 3 Moore, *Federal Practice* 3426, 3456, 3465 (2d ed. 1948), *other members of the class are not entitled to the benefit of the decree;* the decision is *res judicata* only as to the original parties and those who have actually intervened. *E.g., Martinez* v. *Maverick County,* 219 F. 2d 666, 672 (5th Cir. 1955); *Kainz* v. *Anheuser-Busch,* 194 F. 2d 737, 742, 745 (7th Cir. 1952), *cert. denied,* 344 U. S. 820; *California Apparel Creators* v. *Wieder of Calif.,* 162 F. 2d 893, 897 (2d Cir. 1947), *cert. denied,* 332 U. S. 816. This distinction between spurious and true class actions is crucial.

In his second edition Professor Moore abandoned reliance on the *Stewart* case, citing instead the holding in *Shipley* v. *Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947). The "bootstraps" nature of this endeavor has not escaped attention. As Professors Hart and Wechsler have observed in their work *"The Federal Courts and the Federal System"* (1953):

> "Professor Moore's principal authority for the view that independent jurisdictional grounds are not needed to support permissive intervention in a 'spurious' class action is the Shipley case, *supra*. The only authority cited in the Shipley case was Professor Moore. . . .
>
> "Is the Supreme Court likely to uphold this use of Rule 23(a)(3) to accomplish so bald an enlargement of federal jurisdiction?" (p. 937).

The baldness of the enlargement of federal jurisdiction is underscored by Professor Moore himself in his discussion of Rule 24(b),[5] upon which rests the court's authority to permit intervention, whether the interveners are many and hence may be called a "spurious class" under Rule 23(a)(3), or are only one or two.

> ". . . where intervention is sought to present a claim or defense in an *in personam* action and the only basis therefor is a common question of law or fact, there is no reason to permit the intervener's rights to be litigated if they could not have been, had the intervener been joined as an original plain-

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[5] "24(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . ."

tiff or defendant. Procedurally it may be very desirable to permit the intervention, but it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements. . . . Procedurally it may be wise for a court to allow intervention and Rule 24(b) does authorize the court to permit intervention where there is a common question of law or fact. But Rule 24(b) is subject to federal jurisdictional limitations, and if intervention were permitted in this case . . . [the intervener] would be permitted to do indirectly what the jurisdictional rules preclude him from doing directly. . . .

"What has just been said about intervention in an *in personam* action is subject to this qualification: no independent jurisdictional ground is needed to support intervention in a class action, even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved. . . . The reason why intervention in the class action, although such action involves only a common question of law or fact, need not be supported by independent grounds is that *because of the numerous persons involved, the utilization of the representative concept is warranted.* But *in the first . . . case* put above where numerous persons are not involved and hence a class action is not warranted by Rule 23(a)(3), *there is no real reason to dispense with the jurisdictional requirements* which . . . [the intervener] would have to satisfy as an original plaintiff." 4 Moore, *Federal Practice* 126-37 (2d ed. 1950). (Emphasis supplied).

Intervention in both spurious class actions and non-class actions is governed by the same Rule 24(b), permitting intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Why Rule 24(b) is subject to federal jurisdictional limitations when intervention occurs in a non-class action, but the same rule is free of such limitations when intervention occurs in a spurious class action is not satisfactorily explained. Nor can it be: Why the removal of independent jurisdictional requirements in non-class actions on grounds of procedural utility and desirability would constitute an undue expansion of federal jurisdiction, but the removal of the same requirements in spurious class actions does not constitute such an expansion is not satisfactorily explained. Nor can it be. Moore's contention appears to be simply that when supposed procedural utility [6] is great enough—as he considers it in the

[6] The true considerations which bear upon procedural utility in connection with intervention are far broader than Professor Moore has recognized:

> "Permissive intervention is largely a matter of trial convenience. It is designed primarily to allow litigants in the federal courts to clear up in a single suit, questions which would ordinarily arise in separate *federal* suits. But there seems to be no reason why disputes which, if originally brought, would have been confined to a state forum should be dragged into the national courts. The purpose of the Rule is to facilitate *federal* practice and not to reduce state litigation as well. The protective function of the court is not called into play since the intervener in permissive intervention will not be prejudiced or bound by the original proceeding. The original suit does not create the subsequent litigation or catch the third person in the cross fire of the main litigants. While it would be convenient to clear up these questions in a single suit, as long as the national courts are courts of limited jurisdiction it does not seem reasonable to throw additional burdens on already crowded dockets merely because controversies normally

spurious class situation—federal jurisdiction may be expanded; when procedural utility is not very substantial—as in the non-class situation—federal jurisdiction must remain within its Constitutional limitations.

But, as this Court has emphatically stated, the matter far transcends convenience or inconvenience. Congress and this Court have consistently recognized the limits on the diversity jurisdiction of the federal courts imposed by the Federal Constitution (Article III, sec. 2, cl. 1):

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. . . . 'The policy of the statute [conferring 'diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta*, supra, at 270. In defining the boundaries

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without their jurisdiction are similar or identical in some questions of law or fact to a case properly before them." Campbell, *Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. of Pitt. L. Rev. 1, 10-11 (1940). (Emphasis in original).

of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy." *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 76-77.

As we have stated, the citizenship of the interveners is in considerable confusion. None of them alleged their citizenship and only a few their residence (R. 20, 25, 26, 29, 30, 46, 51, 52). They made no request for findings of fact regarding their citizenship (R. 93).[7] And the trial court made none (R. 116). But out of the obscurity, one can discern that two parties aligned as plaintiffs in both the individual actions, Kenneth and Hazel Constant, appear to be citizens of California and so lack diversity with petitioner Black, and that twenty-five or more parties-plaintiff seem to be citizens of Illinois; the state of incorporation of Black-Marshall Oil Company.[8] The determination of fact regard-

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[7] The only finding with respect to citizenship requested by respondents was that the original plaintiff, Amen, was a resident and citizen of South Dakota (R. 93-94). As the majority below recognized, Amen was one of the respondents who had no dealings whatever with Ives, much less with petitioner Black, but instead bought and sold his Black-Marshall stock through another respondent, Danford. (Appendix, p. 62). Apparently, Amen was the only member of the alleged class who was in a position to allege diversity of citizenship with both petitioner Black and Black-Marshall.

[8] Black-Marshall was dissolved under Illinois law on July 1, 1947 (R. 2313). The dissolution was set aside, however, on October 18, 1949, when the United States District Court for the Southern District of Illinois on motion of respondent Amen ordered the appointment of co-receivers (R. 1510-12). In its first opinion, the Court of Appeals recognized this order setting aside the dissolution of Black-Marshall as valid and invulnerable to attack (Appendix, p. 35).

ing citizenship plainly requires further proceedings in the District Court under proper instructions from this Court.

Furthermore, viewing the case as resolved by the majority below in its second opinion, all pretense of federal jurisdiction disappears. The majority below held that the co-receivers' action on behalf of the corporation must fail. It then—in disregard of the applicable substantive law as shown in Chief Judge Phillips' dissent—allowed what is in effect a derivative recovery by respondents through Black-Marshall on the 32,000 shares of stock issued to petitioner. (See Point II, below at pp. 28-32). If this recovery is permitted to stand, then Black-Marshall should remain a party-defendant and the corporation's common citizenship defeats federal jurisdiction as to a large group of respondents.[9] The respondents cannot have it both ways. They cannot recover for and through the corporation for acts in which the corporation participated and at the same time deny that the corporation is a necessary party-defendant in the proceeding.

But whatever the final resolution of the effect which any derivative recovery has on the question of federal jurisdiction, it is plain that upon the present state of

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[9] The motion of the intervening co-receivers to dismiss Black-Marshall as a defendant was apparently granted (although the printed record is not clear) despite the fact that a major claim was a derivative action to cancel shares of Black-Marshall stock, a proceeding which has traditionally required that the corporation be joined as a defendant. See, *e.g.*, *Venner* v. *Great Northern Railway*, 209 U.S. 24; *Doctor* v. *Harrington*, 196 U.S. 579, 587; *Davenport* v. *Dows*, 18 Wall. 626.

the record there was error below in assuming jurisdiction and that the judgment of the Court of Appeals should be reversed and the cause remanded for further proceedings in accordance with the instructions of this Court.

II

THERE IS A COMPELLING NEED FOR THIS COURT TO SPEAK FIRMLY ON THE DEPARTURE FROM THE REQUIRED STANDARDS OF APPELLATE REVIEW SHOWN IN THE COMPLETE DISREGARD OF FINDINGS MADE AFTER A MONTH-LONG TRIAL IN WHICH THE TRIAL JUDGE HEARD THE TESTIMONY OF PETITIONER AND MORE THAN THIRTY-FIVE OTHER WITNESSES.

It requires no detailed examination of the record in this case to demonstrate that the court below completely disregarded the standards of appellate review required under Federal Rule 52(a) and enunciated in the decisions of this Court. So glaring a departure from required appellate standards should not be permitted.

As has been seen, the individual respondents alleged that petitioner Black was guilty of a conspiracy to defraud them of the full value of their stock by procuring their stock for less than its value and less than the amount which they charged he then knew would later be obtained on a sale of the stock or assets of Black-Marshall to an assured purchaser.

The trial of these charges of fraud consumed close to a month. Petitioner Black took the witness stand for a full week. He presented to the court the complete story of what took place and of his part in it. The

Court heard the testimony of more than 35 other witnesses. There was a square conflict between the testimony of petitioner Black and that of Ives, the individual who was found by the court to have made misrepresentations to respondents; and that of Sherrard, who was originally named as a party defendant and then was dismissed on the motion of the plaintiffs and allowed to join as in intervening party-plaintiff. In contrast to petitioner Black, Ives did not take the stand. Not only did Ives fail to take the stand, but his testimony in the three depositions received differed so markedly as to show unequivocally that he could not be telling the truth on all occasions.

The trial court performed what is peculiarly its function under our judicial system. The trial judge resolved conflicts of testimony, and made his decision as the trier of the facts. He saw, heard and believed petitioner. He found explicitly that petitioner was not guilty of any conspiracy to defraud and in fact had no knowledge at the time respondents' stock was purchased for its then full value that Ives had misrepresented any facts to respondents, or that the stock would subsequently become more valuable than at the time respondents sold their shares.

The majority of the Court of Appeals simply ignored these findings and substituted its own findings of fact as it would on a trial *de novo*. This plainly violated Federal Rule 52(a) and the fundamental principles which this Court has said must apply in this area.

As *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 596, makes clear, it is not the function of an appellate court to try a case *de novo* on a cold record

where the attack on the trial court's findings is only a dispute as to the proper inferences to be drawn from the evidence in the record. The mandate of Rule 52(a) is that an appellate court must not set aside findings of fact "unless clearly erroneous"; under this explicit requirement, it is not enough that an appellate court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *Real Estate Boards,* 339 U.S. 485, 495-496; see also *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342. This Court has emphasized in *Walling* v. *General Industries Company,* 330 U.S. 545, 550, where it held that a Court of Appeals cannot reject findings of a district court on the ground that there was conflicting testimony, that:

> "The District Court heard the witnesses, and was the proper judge of their credibility."

That this is an axiom which must be followed in judicial review was cogently put by Judge Learned Hand in *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 433 (2d Cir. 1945):

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has; and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' Davis v. Schwartz, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; Alabama Power Co. v. Ickes, 302 U.S. 464, 477, 58 S.Ct. 300, 82 L.Ed. 374. The reason for this

is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

These settled principles meant nothing to the majority of the Court of Appeals. Insofar as the majority below was concerned, there might as well not have been any decision by the trial court. As is apparent from the following representative illustrations, the trial court's findings of fact were simply disregarded.

Thus the trial court, after first setting forth in careful detail the events which occurred from the time petitioner Black first came into contact with any of the respondents, made the following specific findings of fact:

That, in connection with the misrepresentations made by Ives in 1944 and 1945, "[t]hese misrepresentations were made by Ives without solicitation by Black and without Black's knowledge" (Find-

ing VII, Appendix, p. 10; Finding VIII, Appendix, p. 13);

That the first notice Black received of Ives' misrepresentations came in late 1945 after respondents had sold their stock (Finding X, Appendix, p. 14);

That the value of the Black-Marshall stock at the time respondents sold their shares in 1944 and 1945 did not exceed the prices which they received (Finding XIII, Appendix, p. 16);

That the increase in value of Black-Marshall stock following the time of the sales of their shares by respondents came as a result of the successful drilling program by the Company which resulted in 146 producing wells, which increased the Company's production during the period when the price of oil rose markedly (Finding XIII, Appendix, p. 16).

All of these findings were supported by the trial court's detailed citation to testimony of petitioner Black and other witnesses, as well as to supporting documentary evidence. They form an unassailable foundation for the trial court's conclusion that the evidence did not establish any conspiracy between Mr. Black and Mr. Ives or anyone else and that the evidence did not establish that Black "was guilty of any fraud, practiced any fraud on the plaintiffs, or made any fraudulent misrepresentations to any one of the plaintiffs" (Conclusion VII, Appendix, pp. 18-19). It is clear that in making these basic findings and in awarding judgment to petitioners the trial court accepted Black's testimony and rejected the inconsistent testimony of Mr. Ives and Mr. Sherrard.

In the face of these findings, which necessarily should have been respected under Rule 52(a) and the principles enunciated by this Court, the court below concluded that in May or June of 1944 Black found a market for respondents' stock "in pursuance of a definite plan to eliminate the large family of stockholders" (Appendix, p. 58) and purchased half of respondents' stock in 1944 and the other half in 1945 "in consummation of what we hold to be Black's scheme to defraud" (Appendix, p. 62).[10]

After making these unwarranted findings in complete disregard of those made by the trial court, the court below was then led to adopt a heretofore unknown interpretation of the law of fraud and unjust enrichment under which it held petitioner liable. Disregarding applicable Illinois law, the court below held that petitioner was liable to respondents for the increased value of their stock in spite of the undisputed fact that respondents had "received the full value of their stock" when it was sold (Appendix, p. 61). This unique holding clearly disregarded an essential element, in equity as well as in law, of a cause of action for misrepresentation—that the plaintiff must have been damaged in reliance upon the misrepresentation. See *Roda* v. *Berko*,

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[10] In thus usurping the function of the trial court to resolve conflicts in the testimony, the court below stated that the "record is barren of any benefits to Ives" (Appendix, p. 60), apparently to suggest that his representations were made for petitioner Black's benefit. The fact is that after the sale of stock by respondents in 1945, they re-invested their initial investment in Black-Marshall, plus the substantial profit they had made thereon, in a new venture *formed by Ives* and known first as Dale G. Ives Interests and later incorporated as the Aledo Oil & Gas Company, with Ives as its

401 Ill. 335, 81 N. E. 2d 912, 914 (1948); *Finn* v. *Monk*, 403 Ill. 167, 85 N. E. 2d 701, 706 (1949). Thus, had Black, contrary to the District Court's considered finding, conspired with Ives to misrepresent the facts concerning the sale of Black-Marshall's assets, the respondents could not complain, for they were in no way injured. [11]

Another typical instance of failure to adhere to the proper limits of appellate review is seen in the treatment by the majority below of the District Court's findings of fact in the suit brought by the co-receivers against petitioner Black. The trial court found that all 122,500 shares of common stock issued by Black-Marshall were issued in exchange for the five Kansas leases (Finding VI, Appendix, p. 6). It also made the unequivocal finding of fact that:

> Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually,

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first president. (R. 501, 945-946, 1503-1504, 1696, 1499-1500).

Typical of the disregard of the trial court's finding and the *de novo* consideration by the court below is its treatment of respondent Hall. The court concluded that she was entitled to recover (Appendix, p. 62) even though she could not testify of her own knowledge to any misrepresentations or that she had been induced to sell her stock. (R. 596-597, 599, 601).

[11] The absence of injury to the purportedly defrauded parties readily distinguishes the instant case from those relied upon by the Court of Appeals, such as *Dunnett* v. *Arn*, 71 F.2d 912 (10th Cir. 1934) and *Falk* v. *Hoffman*, 233 N.Y. 199, 135 N.E. 243 (1922). All such cases concerned plaintiffs induced to sell their stock at a price *lower* than its *true value*, when the buyer knew at the time that the same shares, or the corporation's assets, could be sold to yield a *greater price*. In fact, no sale of all the stock or assets of Black-Marshall could have been made in 1944 and 1945 to realize as much as the price received by respondents (R. 1171, 1208, 1226, 164, 311, 1175, 1190-1191, 1126, Ex. K-3, R. 2293).

and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original Kansas leases." (Finding VI, Appendix, p. 7).

These findings of fact were supported by detailed references to testimony and to the documentary evidence. In brief summary, this evidence showed that the issuance of the shares, including the 32,000 shares in issue here, is set forth in the original incorporation minutes (R. 1718-1720). The issuance is also set forth in the minutes of the first meeting of the board of directors, at which the Aledo group, including the respondents, had a majority (R. 1722-1723). It was covered in the stock book (R. 1559-1563). A recital of the total shares issued for the original five Kansas leases was contained in every annual audit report of the company which was read at the directors' and at the stockholders' meetings (R. 1786-1800). In addition to this detailed documentary record there was full testimony by Black that the five leases were transferred for the full 122,500 shares including the 64,870 shares which were carried as Black et al. and were issued jointly to Marshall and him (R. 1287-89, 1479-80, 1206, 1291, 1157, 1192). Moreover, Marshall sold his half of such shares to the corporation at a time when respondents were well represented by membership on the Black-Marshall board of directors and pursuant to a resolution of the stockholders, including respondents (R. 1768-1770, 1795, 1796-1799).[12]

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[12] As Chief Judge Phillips points out in his dissent, the majority below incorrectly refused to give effect to the Kansas statute of limitations which barred the derivative action. The facts leave

Once again, the majority below, in the face of these explicit findings of fact made by the trial court after a month-long trial, makes diametrically opposed factual findings and states, "the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common . . ." (Appendix, p. 66), and goes on to say, with respect to the 64,870 shares, of which some 32,000 were issued to Black, "it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black" (Appendix, p. 67).

After this departure from what the record shows and the trial court found in fact occurred, the majority below was forced once more to reject settled legal doctrine in order to enhance the respondents' ultimate recovery by ordering the cancellation of petitioner Black's 32,000 shares. As has been indicated, in the derivative action the respondents attempted to recover on behalf of Black-Marshall for injuries allegedly resulting to it from the issuance of the 32,000 shares without consideration. On an unprecedented theory which reflects a complete failure to attempt to determine applicable law, the majority of the court below

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little room for doubt that certainly by 1944, five years before suit was brought, respondents knew of the issuance of the shares to petitioner Black and had recognized that the shares were validly issued in consideration for the transfer of the Kansas leases. The applicable Kansas statute, *Kan. Gen. Stat.* § 60-306 (1949), bars a suit for fraud unless brought within two years after discovery of the fraud. This limitation has been construed as requiring suits to be brought within two years after discovery of such facts as would on reasonable inquiry or investigation lead to knowledge of the fraud. See *Woodward* v. *Kendall*, 172 Kan. 332, 239 P.2d 924 (1952); *City of Coffeeville* v. *Metcalf*, 134 Kan. 361, 5 P.2d 807 (1931).

invalidated these shares, which the District Court had found as a fact were properly issued to Black, and required the distribution of their total value pro rata over the remaining "valid" shares of Black-Marshall. Thus, recovery was awarded directly to the respondents, no longer stockholders, on a cause of action derived from the corporation and whose fruits could lawfully accrue only to the corporation.

Here again, the disregard of the requirements of Rule 52(a) had the chain effect of leading to basic errors of substantive law. In achieving them the majority of the court below was persistent, ingenious and, as regards legal principles, wholly original. In its first opinion (filed November 25, 1955) the reasoning was as follows:

(1) The former stockholders of Black-Marshall are without standing to sue on behalf of the corporation, since they do not seek to set aside the sale by petitioner to NCRA of his Black-Marshall shares, but to confirm it, and impress a trust on the proceeds of the sale. They are not claiming to be legal or equitable stockholders of the corporation, so far as this action is concerned, and may not act for the corporation.

(2) However, the co-receivers have standing to sue on behalf of the corporation for a wrong to the corporation.

(3) Petitioner, contrary to the findings of the District Court, committed a wrong against the corporation in obtaining some 32,000 shares without consideration.

(4) The co-receivers may, therefore, recover from petitioner for the corporation the proceeds of the sale of what were, in law, unissued shares.

But, on reconsideration of the case after petition for rehearing had been filed, the court realized that what it had done was to require petitioner to pay back the proceeds of the sale for the benefit, in large part, of the purchaser of the shares and majority shareholder, NCRA. See second opinion, Appendix at pp. 63-64.

So the majority withdrew this highly unsuccessful effort, and tried again. This time the progression of ideas went as follows:

(1) As in the prior opinion, the former stockholders, for the reasons given before, do not have standing to sue on behalf of the corporation.

(2) And while the co-receivers may have capacity to maintain the suit, it would be inequitable to permit them to do so, since NCRA would be the principal beneficiary of their success.

(3) But petitioner, contrary to the finding of the District Court, by having stock issued to him without consideration, committed a wrong against the former stockholders, not against the corporation as the first opinion said. This wrong consisted in obtaining 32,000 shares of stock which should not have been issued, and the proceeds of the sale of such shares to NCRA should therefore have gone pro rata to the other stockholders and not to petitioner.

In short, after holding "that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery," (Appendix, p. 64) the court below simply went on to allow the individual respondents to recover for the alleged wrong to the corporation.

To achieve this conclusion the court entirely reconstructs the negotiations and agreements between the parties as found by the District Court. This is rigorous but, at least, it produced the desired answer. But an inescapable difficulty remains. The 32,000 shares of stock were issued to petitioner. Petitioner either gave consideration for them or he did not. If he did, they are rightfully his. If he did not, the wrong resulted not to the stockholders but to the corporation.[13] Whatever form of words the court below used to describe the alleged wrong committed by petitioner, the law of Illinois, as of other states, is clear on this point.[14] In

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[13] If, contrary to the settled and controlling law, it be assumed that the claim for disallowance of the 32,000 shares was not one which had to be asserted by or on behalf of the corporation, there was nonetheless no basis whatever for the Court of Appeals to have awarded such relief to the individual respondents. The plain fact is that the only claims asserted below with respect to the 32,000 shares were, first, a claim by the co-receivers purportedly acting for the corporation, and second, a claim by the individuals in the nature of a stockholder's derivative action. The Court of Appeals explicitly held that both of these claims must fail. It then went on to decree what amounted to cancellation of the 32,000 shares in the action brought by the individual respondents based on the alleged fraudulent misrepresentations, in which there were no allegations relating to the 32,000 shares and in which no relief was sought as to these shares. Accordingly, on this record there is no basis for the court to have cancelled the 32,000 shares for the advantage of these individuals. This basic jurisdictional shortcoming is not answered by the simple statement of the majority below that "it will not be restrained by mere forms of action or niceties of pleadings" (Appendix, pp. 64-65).

[14] A wrong committed against a corporation does not result in any right of action in a stockholder. Such a wrong creates only a right of action in the corporation. Only if the corporation fails to act may the stockholder bring suit, and even in such cases the stockholder acts solely for the corporation in a derivative suit. Most important, any recovery is for the exclusive benefit of the corporation. See *Bingham* v. *Ditzler*, 309 Ill. App. 581, 33 N.E. 2d

Voorhees v. *Mason*, 245 Ill. 256, 91 N.E. 1056, 1059 (1910), directors charged with issuing stock to themselves without consideration were required to account to the corporation, not to shareholders bringing suit. See also *Chicago Macaroni Mfg. Co.* v. *Boggiano*, 202 Ill. 312, 67 N.E. 17, 20 (1903). The Court of Appeals majority was therefore clearly in error when it permitted the individual respondents to recover for an alleged wrong which, if it existed at all, was a wrong to the corporation alone and not to a group of persons who had once been but no longer were among its stockholders. [15]

These examples illustrate the cavalier treatment given by the majority below to a careful evaluation of all the evidence, and the resolving of conflicting testimony, made by the trial court in a case of grave importance to petitioner, a case which involves not only substantial

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939, 946 (1941); *McIlvaine* v. *City Nat'l. Bank & Trust Co. of Chicago*, 314 Ill. App. 496, 42 N.E. 2d 93, 98 (1942).

This limitation on recovery in a stockholder derivative action has been recognized by the Tenth Circuit itself in *Arn* v. *Dunnett*, 93 F.2d 634, 636 (10th Cir. 1937), *cert. denied*, 304 U.S. 577, as well as by other Courts of Appeals. See *Green* v. *Victor Talking Machine Co.*, 24 F.2d 378 (2d Cir. 1938), *cert. denied*, 278 U.S. 602; *cf. Ramsburg* v. *American Inv. Co.*, 231 F.2d 333, 339 (7th Cir. 1956); *Peter* v. *Western Newspaper Union*, 200 F.2d 867, 873 (5th Cir. 1953).

[15] In allowing recovery to the individual respondents who admittedly were no longer stockholders (Appendix, p. 63), the majority below ignored Rule 23(b) of the Federal Rules of Civil Procedure. By its own words, this rule governing the bringing of derivative actions declares that only persons who are "shareholders" at the time a suit is brought may be plaintiffs in a derivative action on behalf of a corporation. See *H.F.G. Co.* v. *Pioneer Pub. Co.*, 162 F.2d 536 (7th Cir. 1947); *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168, 175 (S.D.N.Y. 1945); *Malcolm* v. *Cities Service Co.*, 2 F.R.D. 405 (D. Del. 1942). Clearly, none of

sums of money but most importantly petitioner Black's reputation. The trial judge heard petitioner Black and clearly credited his testimony. The trial court concluded, as was its responsibility and function, that Black was telling the truth. The majority below should not be permitted to sweep aside this basic right of a defendant to give testimony and to have his credibility decided by a judge who was serving in the place of a jury of his peers. There is a compelling need for this Court to speak firmly on the confines of appellate review which have been so clearly exceeded by the court below.

CONCLUSION

This litigation discloses the mischief that can ensue from failure to adhere to jurisdictional requirements in litigation which comes into federal courts solely on the basis of diversity of citizenship. In the present posture of this case, it compellingly calls for review by this Court so that there be an authoritative determination of the basic jurisdictional rules which the lower courts must follow in diversity litigation, and particularly in the use of the device of the spurious class suit. Paramountly, the Court should resolve the conflict which arises from the failure of the court below to require that federal jurisdictional requirements be met. Moreover, this Court should speak on the refusal of the court below to honor the findings of the trial court and insure that this disregard of the proper scope of appellate review is corrected.

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the individual respondents could satisfy this requirement, for by affirming the sale of Black-Marshall stock to NCRA by petitioner. they ceased to be either legal or equitable stockholders.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST, 1956.

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 3495

A. M. AMEN, PLAINTIFF,

v.

BLACK-MARSHALL OIL COMPANY, a Corporation, et al., DEFENDANTS.

No. 3509

A. M. AMEN, et al., PLAINTIFFS,

v.

BLACK-MARSHALL OIL COMPANY, a Corporation, et al., DEFENDANTS.

No. W-143

D. ARTHUR WALKER and FRED WINDISH, Co-Receivers of Black Marshall Oil Company, a Corporation, PLAINTIFFS,

v.

WILLIAM H. BLACK and RUTH F. BLACK, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW*

At Wichita, Kansas, on the 21st day of April, 1952, these controversies came on for hearing, the respective plaintiffs appearing by their attorneys, D. Arthur Walker,

* These findings and conclusions are as entered by the District Court, with the exception that the record references have been changed to correspond with the printed record.

W. L. Cunningham and William E. Cunningham, of Arkansas City, Kansas; Martin M. Lucente, Jack O. Brown of Chicago, Illinois; Burrell Barash of Galesburg, Illinois; Henry Gott, George B. Collins and W. R. Martin of Wichita, Kansas. The defendants appeared by their attorneys, George Siefkin, Malcolm Miller and Robert N. Partridge.

Thereupon, the cases proceeded to trial on the issues defined in the pleadings in all the actions which were consolidated for trial. After the cases were tried and upon request of counsel, time was given in which to file suggested findings of fact and briefs by all parties after a full transcript of the trial was prepared. Thereafter briefs were filed and all the cases were argued on June 19, 1953, at Wichita, and after such argument were finally submitted to the Court. The Court, being duly advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

I

No. 3495 was begun by the filing of a complaint by Mr. Amen on June 28, 1949. The original defendants named were Black-Marshall Oil Co., a corporation; National Cooperative Refinery Association, a corporation; Landowners Oil Association, a corporation; William H. Black; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. At the plaintiff's motion the action was dismissed as to National Cooperative Refinery Association, a corporation; Leon Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund. (P. 11 and 24). Sherrard later became an intervening plaintiff. An amended complaint was filed on July 25, 1950. Intervening complaints were filed by the following plaintiffs on the dates stated: On July 25, 1950, Baldwin, Fred Brown, Ogle, William Brown, Clark, Danford, Elving, Edith Hall, Hays Hall, McBride, Nelson, E. W. Robinson, L. E. Robinson, Dr. Rogers, Runbom, Riley, Stephens, Stites and Wadleigh; on February 10, 1951, Constant, Ets Hokin, Sherrard and Stevenson, Lundblad and Jones.

The number of shares in controversy for the original and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1,850; Danford, 3,875; Elving, 440; Ets Hokin, 450; Edith Hall, 2,900; Hays Hall, 4,200; Jones, 500; Lundblad, 2,300; McBride, 500; Nelson, 1,000; Ogle, 325;

Riley, 1,000; Robinson, 1,000; Dr. Robinson, 3,650; Dr. Rogers, 3,550; Runbom, 500; Sherrard, 6,983; Stephens, 1,200; Stevenson, 1,250; Stites, 1,525; Wadleigh, 3,000; (Ex. V, R. 1885-1887; Ex. 97-102, R. 1559-1575).

All these shares were sold in 1944 and 1945, through Dale Ives. (R. 158-160, 162, 164, 166, 179, 180; R. 215, 217, 201-203; R. 257, 258, 259-261; R. 269-272; R. 281, 282; Ex. F, R. 1692-1696; R. 310-312; R. 328-330; R. 364; R. 395, 396; R. 422-423, 425-426; R. 449-450; R. 451-453; R. 454-456; R. 457-460; R. 476-478, 485; Ex. 81, R. 1538; Ex. G, R. 1717; R. 494-495; Ex. P, R. 1839, 987, Ex. O, R. 1839, 987, Ex. 108, R. 1576-1577; R. 508-510, 514; R. 521, 525-528; Ex. H-1 and H-2. R. 1948, 527-528; R. 536-538, 540-542; R. 546-549; R. 596, 601; R. 926-929, 931, 934-935, Ex. 346 and 347, R. 1662; R. 942-945; Ex. V, R. 1885-1887, Ex. 97-102, R. 1559-1575).

This controversy concerns whether these original and intervening plaintiffs remained the equitable owners of the shares of stock set opposite their names hereinabove or whether they were entitled to recover from the defendants any sums in addition to the funds received at the time of the sale through Ives in 1944 and 1945.

This action was tried as a result of a consolidation with No. 3509 and No. W-143 during the trial of No. W-143. (R. 894-898).

II

On June 28, 1949, Amen, Wadleigh, Danford, Dr. Robinson, Hays Hall and Riley filed action No. 3509. The original defendants named were Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; National Cooperative Refinery Association, a corporation; Dale G. Ives; Leon F. Huff; Arthur W. Kincade; O. A. Beech; J. R. Sherrard; Spencer I. Berglund; Cecil C. Anderson; Gladys M. Anderson; Lottie H. Anderson; Walter H. Beech; Howard S. Bryant; Fayette B. Dow; Walter G. English; Frank Fritts; Mary G. Fritts; Jas. H. Graham; Edith Hahn; Jesse S. Montgomery; Ruth Kellogg Orr; H. O. Peet & Co., a corporation; Edward Roos; Smith, et al., Trustees for Joan Birnie Hamill, Elizabeth Byron Smith, Harold Smith, Anna Byron Waud, Emily Birnie Smith.

At the plaintiff's motion the action was dismissed as to all defendants except Black-Marshall Oil Co., a corporation; Landowners Oil Association, a corporation; William H. Black; Ruth F. Black; William F. Black; later Berg-

lund became an intervening plaintiff. On July 25, 1950, Bowers, McBride, Nelson, Stites, Baldwin, Berglund, Dr. Rogers, Runbom, Fred Brown, William Brown, Edith Hall, Ogle, Clark, Elving, Stephens and Mr. Robinson filed intervening complaints in No. 3509 and on February 10, 1951, Constant intervened in No. 3509.

The number of shares in controversy held by the different original plaintiffs and intervening plaintiffs are as follows: Amen, 100; Baldwin, 100; Berglund, 3,483; Bowers, 250; Fred Brown, 500; Wm. Brown, 400; Clark, 365; Constant, 1,850; Danford, 3,875; Elving, 440; Edith Hall, 2,900; Hays Hall, 4,200; McBride, 500; Nelson, 1,000; Ogle, 325; Riley, 1,000; Robinson, 1,000; Dr. Robinson, 3,650; Dr. Rogers, 3,550; Runbom, 500; Stites, 1,525; Wadleigh, 3,000. (Ex. V, R. 1885-1887).

This case was in all respects similar to No. 3495 except for the difference in the original plaintiffs and the intervening plaintiffs. The cause was consolidated for trial with No. 3495 and No. W. 143 during the trial of No. W-143. (R. 894-898).

III

Co-receivers D. Arthur Walker and Fred Windish were appointed for the Black-Marshall Oil Company by the United States District Court for the Southern District of Illinois in Civil Action P-1094. J. K. Stevenson, J. R. Sherrard and Spencer I. Berglund were defendants in this action and later became intervening plaintiffs in either 3495 or 3509. (Ex. 1, R. 1510).

These co-receivers filed case No. W-143 on July 14, 1950. Subsequently the co-receivers filed an intervening petition in No. 3495 on September 25, 1950 (R. 25, 26), and in No. 3509 on November 25, 1950. Such receivers were appointed in an action brought in the Southern District of Illinois by some of the plaintiffs in No. 3495 and No. 3509. Trial was had of this cause brought by the co-receivers during which cases Nos. 3495 and 3509 were consolidated with it. (R. 894-898). At the close of all the plaintiffs' evidence, the co-receivers elected to rely on their complaint in No. W-143. (R. 952). The action of the co-receivers is to redress wrongs, allegedly committed by the defendants to the corporation, Black-Marshall Oil Company.

IV

The Petroleum Investment Company was formed in Illinois in late 1938 as a partnership association, joint ad-

venture, syndicate or group of individuals, being, in addition to Black and Ives, Berglund, Hazel Constant, Danford, Edith Hall, Hays Hall, the Lundblad sisters, Dr. Robinson, Dr. Rogers, Sherrard, Stevenson, Stites and Wadleigh. Many of these individuals signed Petroleum Investment Company agreements with Black. Most of the investors in each instance invested in the company through Dale Ives who was their leader and spokesman. The Petroleum Investment Company invested about $21,000.00 in leases and the development of leases but was not successful and by early 1939 had exhausted its funds in drilling nine dry holes in Illinois and Indiana. (Ex. 4, R. 1524; R. 1149, 1468, 1469, 1221-1227, 1207, 1234; R. 137-139, 173, 145, Ex. 3, R. 1524; R. 189, 192, 207-209; R. 250-251, 235, 236, 240, 242; Ex. 13, R. 1533; R. 299-303, Ex. F, R. 1676, 1678, 1684; Ex. 28, R. 1535; R. 323-327, 335; Exs. 29 through 53, R. 1535; R. 1535; R. 1234, 1235, 1239, 1240; R. 352, 353, 355; R. 415, 416; R. 465, 469, 481, 482, 472; Ex. 80, R. 1537; R. 488, 489; R. 587, 588; R. 921, 922; R. 936, 937; R. 368-370, 616, 617, 621, 628, 770; Ex. 29 through 53, R. 1535).

V

In the early spring of 1939, Black left Illinois to meet Marshall in Tulsa, Oklahoma. Black acquired at least $10,000.00 from the sale of his interest in leases in White County, Illinois, which transaction and which leases had no connection whatever to the work of the Petroleum Investment Company, the Black Oil Company or the Black-Marshall Oil Company. (R. 1150, 1151, 1155, 1230-1232, 1234, 1242-1246, 1357, 1358, 1470-1475, 1046, 1060-1061; Ex. U-3, R. 2300). After an automobile accident in which Black received injuries which necessitated his hospitalization, he met Marshall in Tulsa and formed a partnership with Marshall for the acquisition and development of leases in Kansas. (R. 1480; Ex. Y-3, R. 2312; R. 1110, 1152, 1161). In June or July, the partnership, consisting of Black and Marshall, acquired the Esfeld lease as a farmout from Sohio Oil Company and made a deal with Bennett, Bronson & Murmos to drill a well on the Esfeld lease which well came in as a producer in July of 1939 and was equipped by the partnership. Thereafter and prior to the incorporation of Black-Marshall, the partnership acquired four other leases in Kansas, the Weber, the Dolechek, the Hoffman and the Krier. (R. 1152-1154, 1254, 1258, 1477, 1478). Beginning in late August or the early fall of 1939, Black received funds from

Ives and others of the Petroleum Investment group to assist the partnership in acquiring and equipping leases and as of December 7, 1939, had received $17,650 from such group and had spent on the Kansas leases $28,415. (R. 1152, 1153, 1236, 1242, 1246, 1248; Ex. 10, R. 1532, 228). Subsequently and before incorporation, both Black and the Illinois investors put more money into the venture. (Ex. B-2, R. 2269; Ex. C-2, R. 2270; Ex. E-2, R. 2272; Ex. V-3, R. 2305; Ex. W-3, R. 2308; R. 1259, 1260, 1490-1493).

VI

(A) The Black-Marshall Oil Company was incorporated on January 3, 1940, with an authorized capital of 20,000 shares of six per cent cumulative preferred stock at a par value of $10.00 and 200,000 shares of no par value common stock; a total of 9,055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five Kansas leases, the Dolechek, Esfeld, Hoffman, Krier and Weber, and the corporation assumed an indebtedness of $8,827.93 against such leases. The common stock was issued on the basis of $1.00 per share. (R. 1157, 1158, 1259-1261; Ex. I, R. 1720; Ex. R, R. 1845; Ex. Y through Ex. E-1, R. 1917 to 1926). The Petroleum Investment Company investors were issued stock on the basis of one share of common for each $2.00 invested, including all money invested in the dry holes in Illinois, and one share of preferred to each $4.00 invested. (R. 173, 174, 149; R. 193, 206-208; R. 250, 251, 241, 242; R. 306; Ex. F, R. 1681, 1684; R. 327, 335; R. 354-356; R. 417, 430; R. 471, 481, 482; R. 490, 499; R. 588, 589; R. 640, 769, 770). Ives allocated the original issue of stock to each of the investors in the Petroleum Investment Company. (R. 1201, 1202; 1049; 1078, 1079; Ex. X, R. 1915). There was also authorized the issuance of 2,000 shares of preferred and 20,000 shares of common to be exchanged for 33,856.8 shares of the capital stock of the Landowners Oil Association. (Ex. I, R. 1721; Ex. R, R. 1845; Ex. Y through Ex. E-1, R. 1917-1926). Black became chairman of the board of directors and president of the corporation at its inception and continued in such offices throughout the existence of the corporation. (R. 1299; Ex. I, R. 1718). Ives became a director and secretary-treasurer of the corporation and continued in such offices throughout the existence of the corporation. (R. 372; Ex. I, R. 1718). Berglund was elected a director in 1941 and served until he moved

to Florida in September, 1944. (R. 471, 473; Ex. I, R. 1767; 1786, 1789, 1791, 1795, 1798). Dr. Robinson was elected a director at the 1941 stockholders meeting but was called to the service and never served as a director for any real period of time. (R. 245; Ex. I, R. 1767; 1786). Sherrard was elected a director at the 1941 stockholders meeting held in January in Aledo and served and remained as a director until September, 1945. (R. 419-420, 430-444; Ex. I, R. 1767; 1786, 1789, 1791, 1795, 1798). Stevenson was elected a director at the inception of Black-Marshall but only came to Kansas once but was re-elected a director through 1944. (R. 930, 932; R. 711-715; Ex. I, R. 1721; 1767, 1786, 1789, 1791, 1795, 1798). Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five Kansas leases. (R. 1192, 1479, 1480, 1287, 1281, 1292; 1044-1046; 1061-1063; Ex. S, R. 1859, 1869, 1872; Ex. R, R. 1845; Ex. 97, R. 1558; Ex. 98, R. 1561).

(B) After incorporation and throughout the history of the corporation to September, 1945, Black received many requests, demands and incessant overtures for dividends, loans, money for stock from the Aledo group of stockholders. (R. 1170, 1173, 1294, 1310, 1318-1320, 1323, 1325, 1330; R. 1109, 1110; Ex. P-1, R. 2079; Ex. Q-1, R. 2080; Ex. G-2, R. 2273; Ex. K-2, R. 2275; Ex. N-2, R. 2277; Ex. H-2, R. 2273; Ex. O-2, R. 2278; Ex. P-2, R. 2279-2281; Ex. Q-2, R. 2281; Ex. R-2, R. 2282; Ex. T-2, R. 2283; Ex. U-2, R. 2284; Ex. X-2, R. 2284; Ex. S-2, R-2282; Ex. C-3, R. 2288; Ex. 121, R. 1590, 760; Ex. 122, R. 1590; Ex. 123, R. 1591, 761, 762; Ex. F-3, R. 2290; Ex. G-3, R. 2290; Ex. 27, R. 1534, 297; Ex. 86, R. 1539).

VII

In the spring or early summer of 1944, many attempts were made to sell the stock in Black-Marshall Oil Company or the assets of Black-Marshall Oil Company to realize $10.00 a share to each stockholder. The NCRA was among the prospective purchasers but the contemplated sale to the NCRA fell through in May of 1944, and no sale could be made of Black-Marshall stock or assets to realize $10.00 a share for each stockholder. (R. 1170-1172, 1330; R. 919, 920; Ex. 344, R. 1659; Ex. 345, R. 1660; Ex. 122, R. 1590). During 1944 Dale Ives made misrepresentations to many Aledo stockholders:

In the summer of 1944, Ives told Berglund that the producing properties of Black-Marshall had been sold and that Berglund should turn in half his shares; that there would be an assessment of so much a share in case of starting up later on. (R. 476-477).

In the summer of 1944, Ives told Fred Brown that Black had made a deal with the Kansas City Coop. and that it would be necessary for the stockholders to turn in half their shares to show the purchasers that they were behind Mr. Black in the deal and that the Landowners and undeveloped leases would not be sold (R. 536, 537).

Ives told William Brown in 1944, that Black had completed a deal to sell the producing wells of Black-Marshall and that the stockholders should turn in half their stock to sh w good faith in the deal; that the Landowners and undeveloped leases were being retained. (R. 546-547).

In the summer of 1944, Ives told Clark that he would like for him to surrender half his Black-Marshall shares since the producing properties had been sold and half the stock was needed to show good faith and bind the sale but that the undeveloped properties would be retained and after two years each of the stockholders would receive his proportionate interest in such undeveloped properties. (R. 281, 282).

In June of 1944, Ives told Mrs. Constant that she should bring in half the shares she and her husband held since the producing properties were being sold and the Landowners and undeveloped properties retained; that Black needed half the shares in order to show good faith and that 51% of the shares were behind the deal. (R. 494-495).

Ives told Danford in June of 1944, that a deal had been made where the stockholders would receive $10.00 a share for the first half of their stock and more for the second half of their stock; that the undeveloped properties and Landowners would be retained but that Black had to have 51% of the shares to bind the sale. (R. 158-160, 162, 164, 179).

In the summer of 1944, Ives told Hays Hall that Black had made a deal with the Coop. and sold the producing properties of Black-Marshall and had retained the undeveloped properties and Landowners which after two years would form the nucleus of a new corporation and each stockholder would get the same proportionate shares as they held in Black-Marshall; that at least half the stock

was needed to show good faith. (R. 310, 311; Ex. F, R. 1692-1694).

In July or August of 1944, Ives told his secretary, Myrtle Lundblad, that Black had made a deal and was selling the producing wells of Black-Marshall and retaining the undeveloped properties and Landowners; that the stockholders should send in half their stock so that Black could make the deal. (R. 942, 944).

In June of 1944, Ives told Riley that Black had made a sale of the producing properties and had to have possession of at least 51% of the stock in order to show good faith; that the undeveloped leases and Landowners were being retained; that the first half would be at $10.00 and the second half would be called for later and would bring more money. (R. 394, 396).

In the summer of 1944, Ives told Mr. Robinson that there were prospects of a sale of the Black-Marshall Company or its shares; that half the shares had to be put up to show good faith; that the purchaser had an option on buying the company or the producing wells and that the entire stock would eventually be sold. (R. 269, 272).

Ives told Dr. Robinson about Easter time in 1944, that Black-Marshall was going to be sold and that Dr. Robinson should leave his shares with Ives. (R. 257, 258).

In the summer of 1944, Ives wrote Dr. Rogers that Black was on a deal to sell Black-Marshall and that he needed her shares in order to show good faith in the deal; and told her that the shares would become worthless if she did not turn them in since the sale was going through. (R. 328, 329).

In May of 1944, Ives told Runbom to bring in his stock and Runbom did and asked that when it was reissued it be issued jointly in both his and his wife's names. (R. 521, 525, 526; Ex. H-1, H-2, R. 1948, 527, 528).

In the summer of 1944, Ives told Sherrard that a deal had been made whereby the stockholders would receive $10.00 a share for the first half of their stock and probably more for the remaining half; that the sale was of the producing properties; that the undeveloped leases and Landowners were being retained. (R. 422, 423).

In June of 1944, Ives told Stephens that the producing properties of Black-Marshall had been sold and that Ives was collecting half the stock in order to bind the deal but that the Landowners and non-producing properties were being held. (R. 508, 514).

Ives told Stevenson in 1944, that a sale had been made of Black-Marshall and in order to complete the sale the stockholders had to turn in half their stock at $10.00 a share. (R. 926, 927, 931, 934; Ex. 347, R. 1662).

In June of 1944, Ives told Dr. Wadleigh that a deal was being made to sell Black-Marshall; that Wadleigh should turn in half his stock since 51% of the stock was needed to show a bona fide deal. (R. 215, 201, 202).

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. (R. 1171, 1173, 1480 1481, 1209, 1318-1319, 1323, 1331, Ex. 121, R. 1590, 760; Ex. 122, R. 1590; Ex. 123, R. 1591, 761, 762; Ex. 124, R. 1591, 763-765; Ex. E, R. 1674; Ex. F-3, R. 2290; Ex. G-3, R. 2290).

Ives obtained approximately half the shares held by all the plaintiffs in actions Nos. 3495 and 3509 which he sent in to the Black-Marshall Company or to Bill Black, and distributed to the same stockholders $10.00 a share for their stock so turned in. Of the shares so turned in; 25,000 were sold to Roos, Gill and Kincade. (R. 1310, 1320-1322, 1328; Ex. V, R. 1885; Ex. 100, R. 1565; 11,714 were sold to Black and the remainder were paid for by Black-Marshall itself, retained by Black-Marshall and subsequently retired. (R. 1193, 1194, 1172, 1333-1334, 1375-1381; Ex. V, R. 1885; Ex. 266, R. 1605, 1376).

VIII

In 1954, further attempts were made to sell the Black-Marshall Oil Company or its stock to various purchasers for an amount to net each shareholder $12.00 a share. No purchaser was found who would pay an amount to net each shareholder $12.00 a share for the stock outstanding in Black-Marshall and a contemplated sale to the NCRA fell through in September 1945. (R. 1173-1175, 1361, 1125, 1126). In 1945 Ives made certain misrepresentations to various stockholders:

He sent a wire to Berglund in Florida on August 29, 1945, advising that the producing properties of Black-Marshall were sold for $12.00 a share and the Landowners Oil Company retained; that Berglund should send his stock in blank to the Fourth National Bank in Wichita and close the deal by September 1. (R. 478, 485; Ex. 81, R. 1538; Ex. G, R. 1717).

In July or August of 1945 Ives told Fred Brown that the deal with the Kansas City Coop. had gone through and

it was necessary to turn in the remaining half of the stock and that after two years the stockholders would develop the undeveloped properties and Landowners which were retained and that the Black-Marshall stock would bring $12.00 a share. (R. 538, 540-542).

In the summer of 1945, Ives told William Brown that the deal was completed and that he should turn in the remainder of his stock; that the producing wells of Black-Marshall were being sold and the undeveloped leases and Landowners retained. (R. 548, 549).

In the latter part of August, 1945, Ives told Clark to bring in his remaining shares; that the undeveloped properties were being retained; that the producing properties were sold and that after two years such undeveloped properties would be returned to the stockholders and each would receive the same proportionate amount as held in Black-Marshall. (R. 282).

Ives wrote Black-Marshall relative to the sale of the Constant stock on September 17 and on September 20, 1945. (Ex. P, R. 1839, 987; Ex. O, R. 1839, 987; Ex. 108, R. 1576, 1577).

About August of 1945, Ives told Danford that the sale of Black-Marshall was completed and that the rest of the stock should be turned in for $12.00 a share and that the Landowners and undeveloped acreage would be retained and held for two years because of tax matters or for legal reasons and would form the nucleus of a new corporation but that for two years the personnel of Black-Marshall had to work with the purchaser, the Kansas City Coop. (R. 164-166, 179, 180).

Late in the summer of 1945, Ives told Hays Hall that the deal mentioned in 1944, was completed; that the stock should be turned in and he would receive $12.00 a share. (R. 311, 312, Ex. F, R. 1695, 1696).

In October of 1945, Ives told his secretary, Miss Lundblad, she should turn in the second half of her stock and would receive $12.00 a share but that the stockholders would have more money coming since the Landowners and undeveloped properties would be divided among them, but not for two years, because of taxes. (R. 943-945).

In August of 1945, Ives told Riley that the Black-Marshall sale was complete and the stockholders would receive $12.00 a share; that the undeveloped leases and Landowners were retained and would be returned as the nucleus for a new company in which the stockholders would re-

ceive the same proportionate ownership as they had held in Black-Marshall but that for two years the personnel of Black-Marshall would work for the purchaser, the Kansas City Coop. (R. 395, 396).

In the late summer or early fall of 1945 Ives told Mr. Robinson that the Black-Marshall deal had gone through, that there was a buyer who was going to take up the option on all the developed properties and close the deal for the sale of the stock which should be sent in; that a new company would get started after two years to operate the Landowners, that the purchaser would not permit the operation of the Landowners or other leases for two years. (R. 270, 271).

Ives told Dr. Robinson in September of 1945 that Black-Marshall had been sold but that the stockholders would be in the oil business again in a new company on the same pro rata basis as held in Black-Marshall, soon. (R. 259-261, 248).

In the summer of 1945 Ives wrote Dr. Rogers to send in her remaining shares of Black-Marshall stock. (R. 329, 330).

In 1945 Ives told Sherrard that the balance of the stock should be turned in and would bring $12.00 a share but that the Black-Marshall sale did not include all the assets of Black-Marshall since the undeveloped properties and Landowners were being retained but would not come back to the stockholders for two years and that after such period they could make plans for development of such properties. (R. 425, 426).

In the summer or early fall of 1945 Ives told Stephens that Black was making a final deal on selling the producing properties of Black-Marshall but was retaining Landowners and the undeveloped properties for two years; that a side deal was being made whereby the Landowners and undeveloped properties would come back after two years but were held up for such period for tax purposes. (R. 509, 510).

In August of 1945 Ives told Stevenson that his remaining shares in Black-Marshall should be surrendered and that he and the other stockholders would be reissued the same amount of stock in the Landowners Company as they had held in Black-Marshall but not until after legal technicalities were ironed out would the reorganization take place. (R. 927-929, 931, 934, 935, Ex. 346, R. 1662).

In the summer of 1945 Ives told Mrs. Stites that Black

needed the rest of the stock to complete the sale of Black-Marshall and that a new company would be formed and the stockholders would have two shares for one on the shares held in Black-Marshall but not until after two years. (R. 364).

In 1945 Ives told Wadleigh that Black-Marshall was sold and that Ives had to have the rest of his shares. (R. 217; 202, 203).

These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge. (R. 1189-1191, 1203, 1209, 1348-1349, 1361-1362, 1368-1369, 1392-1393, 1480-1481; Ex. 27, R. 1534, 297; Ex. P, R. 1839; Ex. 108, R. 1576; Ex. O, R. 1839, 987; Ex. 86, R. 1539; Ex. 12, R. 1532).

Ives obtained the balance of the stock held by the plaintiffs in Nos. 3495 and 3509 and delivered such stock to the Black-Marshall Oil Company or Black. The Black-Marshall Oil Company paid each one of the plaintiffs for such shares at the rate of $12.00 a share. (R. 1201; Ex. V, R. 1885).

In September of 1945 a loan agreement was negotiated between Black-Marshall and the NCRA which was reduced to writing on October 1, 1945, whereby the NCRA loaned $3,200,000 to Black-Marshall and Black-Marshall obligated itself to drill 12 producing wells each year for which the NCRA would loan an additional $22,000 for each producing well so drilled. (R. 1175-1177, 1364, 1365; Ex. 95, R. 1551, 558; Ex. 359, R. 1665; Ex. 360, R. 1665).

The NCRA was conversant with the purchase by Black-Marshall of the stock owned by the plaintiffs in Nos. 3495 and 3509 at the time of the loan. The NCRA appraised the value of the Black-Marshall properties at the time of the loan as being very little, if any, in excess of the amount of the loan. (R. 1190-1192, 1126, 1130-1131, 1367).

IX

There is no evidence that the following plaintiffs in Nos. 3495 and 3509 relinquished or sold their stock in the Black-Marshall Oil Company as a result of any misrepresentation by anyone: Bowers, 250 shares; Ets Hokin, 450 shares; Jones, 500 shares; McBride, 500 shares; Nelson, 1,000 shares; Amen, 100 shares; Baldwin, 100 shares; Elving, 440 shares; Edith Hall, 2,900 shares; Ogle, 325 shares.

(R. 479, 1717, 485, 486, 449, 450, 161, 162, 451-453, 162, 457-460, 454-456, 596, 601).

X

Black received a letter from Ives dated November 10, 1945, stating that Ives had told the Aledo stockholders that Black-Marshall was sold and the Landowners and undeveloped properties retained which would be the basis of a new company after two years and that Black should so inform Wadleigh. This was the first notice to Black of Ives' misrepresentations. Black took no action as a result of or after receiving this letter. (R. 1532, 1352-1356; Ex. 84, R. 1538; 1387-1391; 1503, 1504; Ex. 375, R. 1666; 1499-1500; 945-946, Ex. 12, R. 1532).

XI

At the time of the incorporation of Black-Marshall Oil Company, the corporation was without funds with which to develop its oil properties. Funds were obtained to develop such properties by Black's obtaining loans from various lending agencies which he personally guaranteed up to $1,000,000 at the First National Bank & Trust Co., of Oklahoma City, alone, throughout the existence of the corporation. (R. 1161-1163; Ex. R-3, R. 2298-2300; R. 1845, 1847; R. 1917, Ex. Y, R. 1917). During the corporate ex- carried an account with the corporation and took advances istence Black carried an account with the corporation and took advances from and made advances to the Black-Marshall Oil Company. (R. 1163, 1207; 1436-1458; Ex. K, R. 1813; 1814; 1816; 1819; 1820; 1822; 1823). All such transactions were regularly kept and recorded on the books and records of the corporation and an audit was made, begining on July 31, 1940, at the end of each fiscal year which disclosed the balance in all accounts, including Black's account. R. 1935; 1939; Ex. E-1, R. 1926-1941; Ex. R, R. 1845; Ex. Y, R. 1917; Ex. Z, R. 1917; Ex. A-1, R. 1917; Ex. B-1, R. 1918; Ex. C-1, R. 1918; Ex. D-1, R. 1922; R. 1049, 1080-1084; 1169; 946. At the end of the fiscal year July 31, 1940, Black-Marshall owed Black $15,993.25; on July 31, 1941, $5,416.70; on July 31, 1942, $2,305.62; at the end of the fiscal year July 31, 1943, Black owed the corporation $3,343.96; on July 31, 1944, $23,907.85; and on July 31, 1945, $3,092.51.

Thereafter Black obtained substantial funds for his own private purposes from Black-Marshall, including $250,000 for a tuna boat, all of which items were regularly charged to Black's account on the books of the corporation and the account closed out by Black's check dated June 30, 1947, in the amount of $591,064.07. (R. 1196-1197, 1426, 1437, 1485; Ex. S-3, R. 2300; Ex. 290, R. 1617, 1629).

The stock purchased from the plaintiffs and others was charged first to the Dale Ives stock account and later to the W. H. Black stock account and the suspense stock account, which accounts were finally balanced and closed out in June, 1947. (R. 1047, 1048; 1094-1096; 1193, 1194; Ex. 288, R. 1613; Ex. 289, R. 1615; Ex. 88, R. 1541; Ex. 89, R. 1541; Ex. 108, R. 1576; Ex. 109, R. 1578; Ex. 110, R. 1579; Ex. I, R. 1799; Ex. I, R. 1740).

XII

In June of 1947 Black sold his stock in Black-Marshall to the NCRA for $51.06 a share. (R. 1485, 1185-1186, 1196, 1140, 1142-1147, 958, 961, 963, 979). The NCRA also purchased stock held by Dale Ives as executor of the Boyd estate (Ex. 0-3, R. 2296). Dale Ives was employed by NCRA to send out notices for a meeting of the stockholders to consider dissolution and to dissolve the Black-Marshall Oil Company. (Ex. N-1, R. 2073; Ex. 0-1, R. 2074). The Black-Marshall Oil Company was dissolved and a statement of intent to dissolve by voluntary action of the corporation was filed of record in Mercer County, Illinois, on June 30, 1947, recorded in Book 185 on pages 451 and 452, and the articles of dissolution of Black-Marshall were filed in Mercer County, Illinois, on July 1, 1947, recorded in Book 185, pages 453 to 456, inclusive. (Exs. 279 and 280, R. 1607, 1610, 841; R. 1140; 1128-1130, 1134-1135; Ex. A-4, R. 2313; Ex. P-3, R. 2296).

After dissolution, all the assets of the Black-Marshall Oil Company were distributed in kind pro rata to its stockholders of record, including the NCRA. (R. 961, 963-966, 976-978; Ex. 292, R. 1649; 1128, 1129, 1137; 1140; Exs. 279, 280, R. 1607, 1610, 841, 846; Ex. E-4, R. 2314; Ex. F-4, R. 2316). Such dissolution and distribution of assets was made after Black's repayments to the corpo-

ration and the closing out of all Black's accounts with the corporation and after the stockholders of Black-Marshall, including the NCRA with 65,126 shares and Victor Roos with 10,000 shares, had full knowledge of Black's accounts and the method of balancing such accounts. R. 1185-1187; 1128, 1129, 1131, 1132, 1134; 1140; Ex. E-1, R. 1926, 833; Ex. I, R. 1783, 1785; 1804-1807; Ex. 279, 280, R. 1607, 1610).

XIII

The evidence discloses no purchaser could be obtained who would pay enough to net each stockholder in Black-Marshall $10.00 a share in 1944 and the value of Black-Marshall stock in 1944 did not exceed $10.00 a share. (R. 1170, 1172, 1208, 1325-1326, 1330-1331, 1339; 164; 311; Ex. A-2, R. 2267; Ex. Y-2, R. 2285; Ex. Z-2, R. 2286; Exs. A-3 and B-3, R. 2287; Ex. I, R. 1768-1771; Ex. I, R. 1796-1799; Ex. X-2, R. 2284).

Prior to the NCRA loan to Black-Marshall on October 1, 1945, no purchaser could be found who would pay enough for Black-Marshall to net the stockholders $12.00 a share and the stock of Black-Marshall did not exceed in value $12.00 a share. (R. 1173-1176, 1190-1191; 1126, 1129-1131; Ex. K-3, R. 2293; Ex. 25, R. 1534, 295; Ex. 26, R. 1534, 296; Ex. 27, R. 1534, 297; 1551, 558-566; 1364, 1365). After the loan to Black-Marshall on October 1, 1945, some stock was purchased by Black-Marshall at $17.50 a share. (R. 1367, 1383-1385; 1580, 603-604; Ex. 115, R. 1581; Ex. 116, R. 1583; Ex. 117, R. 1585; Ex. 118, R. 1587; Ex. I, R. 1775). There is no other evidence of the value of Black-Marshall stock at this time.

The increase in value of Black-Marshall stock after September 30, 1945, came as a result of the drilling program of Black-Marshall and the obtaining of 146 producing wells, thus increasing the production of the Black-Marshall Oil Company during the period when the price of oil rose from $1.25 per barrel to $1.85 per barrel. (R. 1182, 1191-1192; Ex. G-1, R. 1947; Ex. I-1, R. 1949 et seq.; Ex. 94, R. 1545 et seq.).

XIV

The Court hereby resolves all controversial issues of fact and law not specifically covered herein in favor of the defendants and against the plaintiffs. (R. 130).

Conclusions of Law

I

The exhibits offered in evidence by either party on which the Court reserved its ruling for later determination are all admitted in evidence.

II

Exhibits K-1 and L-1 offered in evidence by the defendants for impeachment purposes relative to the testimony of Dale G. Ives and on which the Court reserved its ruling are admitted in evidence for the purpose offered. *Insul-Wool Insulation Co.* v. *Home Insulation, Inc.*, 176 F. 2d 502.

III

The Black-Marshall Oil Company was incorporated and dissolved in the state of Illinois and the relationship of the parties is governed by the Illinois law.

131 F. 2d 400, *Maxwell* v. *Enterprise Wall Paper Mfg. Co.*; 193 F. 2d 666, *Mayflower Hotel Stockholders Protection Committee* v. *Mayflower Hotel Corp.*; 196 F. 2d 40, *Air Traffic & Serv. Corp.* v. *Fay*; 163 F. 2d 804, *Langfelder* v. *Universal Lab.*; 143 F. 2d 752, *RFC* v. *Goldberg*; 179 F. 2d 760, *Kroese* v. *Gen. Steel Castings Corp.*; 162 F. 2d 36, *Zahn* v. *Transamerica Corp.*

IV

The sale to the NCRA in June of 1947 was of stock and not assets and the NCRA received its proportionate part of the assets of Black-Marshall on distribution after dissolution and thereafter purchased the remaining assets which had belonged to Black-Marshall from the other stockholders who received their proportionate part of the Black-Marshall assets on distribution after dissolution.

V

The evidence does not establish that there was any conspiracy between Mr. Black or any of the defendants with Mr. Ives or anyone.

VI

The evidence does not establish that Mr. Ives was the agent of Mr. Black.

VII

The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, did not practice any fraud on any of the plaintiffs, and made no fraudulent misrepresentations to any one of the plaintiffs.

VIII

The individual plaintiffs have proved no injury to themselves resulting from the sale of their stock in Black-Marshall in 1944 and 1945.

IX

The Black-Marshall corporation and all the stockholders of Black-Marshall in June of 1947 approved and ratified Mr. Black's payments and the balancing of Mr. Black's accounts with the Black-Marshall Corporation.

X

The actions of the individual plaintiffs should be dismissed and judgment entered for the defendants for the defendants' costs.

XI

The action of the co-receivers should be dismissed and judgment entered for the defendants for the defendants' costs.

Dated this 31st day of March, 1954.

DELMAS C. HILL.

Filed April 1, 1954.

ORDER CORRECTING CLERICAL ERRORS (ALL CASES).

It appearing to the Court that there is a clerical error in Conclusion of Law VII, a part of the Findings of Fact and Conclusions of Law in the above entitled case dated March 31, 1954, and entered April 1, 1954, and that such Conclusion of Law VII should read:

> The evidence does not establish that Mr. Black or any of the defendants was guilty of any fraud, prac-

ticed any fraud on the plaintiffs, or made any fraudulent misrepresentations to any one of the plaintiffs.

It is Ordered that these changes in Conclusion of Law VII be made by interlineation in the original instrument on file. Dated this 2d day of April, 1954.

DELMAS C. HILL.

Filed April 2, 1954.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1955

Number 4962

A. M. AMEN, et al., APPELLANTS

vs.

WILLIAM H. BLACK, APPELLEE.

Number 4963

A. M. AMEN, et al., APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

Number 4964

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

(November 25, 1955)

Appeal from the United States District Court for the District of Kansas

D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants.

Malcolm Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Coulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, *Chief Judge*, and MURRAH, *Circuit Judge*, and WALLACE, *District Judge*.

MURRAH, *Circuit Judge*.

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the Company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the Company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the Company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of Company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which Company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

The Spurious Action of the Individual Stockholders

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellees challenge the propriety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. Shipley v. Pittsburgh & Lake Erie Ry Co., 40 F. Supp. 870; Dickinson v. Burnham, 2 Cir., 197 F. 2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." Blazer v. Black, 10 Cir., 196 F. 2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold for an amount sufficient to yield the stockholders $10.00 per share; that the undeveloped properties of the Company were being retained for development at a later propitious time; and that the stockholders should sur-

render fifty percent of their stock in order to bind the transaction. The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were concededly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false represenations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. United States v. United States Gypsum, 333 U.S. 364; United States v. Waymire, 10 Cir., 202 F. 2d 550; McAllister v. United States, 348 U.S. 19; United States v. Oregon Medical Society, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil. The contracts in identical terms provided that Black would receive one-fourth of the profits from

the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $28,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an automobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois corporation with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00, and 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of common for every $2.00 invested and one share of preferred for every $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black

and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meeting in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas where the company offices were maintained.

The productive leases in Kansas were developed in 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was considerable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the stock of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting

something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few days later, Black wrote Ives outlining his negotiations with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal with the co-op." Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $248,750.00 were transferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were

used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group concerning the progress of the supposed sale, or for that matter, the progress of the company, until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by a check to Ives who paid the stockholders from his stock account in the Aledo bank. At this point in the course of events Black had in his possession and in his lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for each producing well so drilled. The company continued to prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders having previously agreed to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish

to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the Black-Marshall Oil Company. From the total consideration of the sale of the stock to the N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan. Henceforward Black became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "Although the principal may not have actually authorized the particular fraudulent act, yet he is respon-

sible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency § 363; see also Restatement Agency § 261; Anheuser-Busch v. Grovier-Starr Produce Co., 128 F. 2d 146; Cox v. Pabst Brewing Co., 128 F. 2d 468; Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency § 362; see also Restatement Agency §§ 257, 258.

Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black.[1] In their brief

[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties and Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years." (b) In the early Fall of 1945 when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them

the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." Maryland Casualty Co. v. Beebe, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis, only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability rule, see Blazer v. Black,

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in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

10 Cir., 196 F. 2d 139, or the less stringent rule applicable in Illinois, see Agatucci v. Corradi (Ill.), 63 N.E. 2d 630; Dunnett v. Arn, 10 Cir., 71 F. 2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See Auer v. Wm. Meyer Co., et al., 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur. Trusts, Sections 220, 225 and 226; Securities and Exchange Commission v. Chenery, 318 U.S. 80; Manufacturers Trust Co. v. Becker, 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his inequitable conduct. Falk v. Hoffman (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. Dunnett v. Arn, supra, at Page 920; Blazer v. Black, supra.

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. Dunnett v. Arn, supra; Blazer v. Black, supra; Falk v. Hoffman, supra. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were specifically excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With respect to the parties falling within this cate-

gory who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member of the Aledo Group and a large stockholder. It was through Dr. Danford that both Amen and Baldwin were induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency, § 315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on

cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of the company in proportion to their equitable stockholdings at the time of the sale along with the other appellants as to whom the trial court found Ives made misrepresentations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

Corporate Claims of the Stockholders and Co-Receivers

Appellees concede the dual capacity of the appellant-stockholders to seek the rescission of the sale of their stock to Black in 1944 and 1945 and the redress of corporate wrongs in the same action on the theory that upon rescission, the appellants become equitable stockholders with capacity to bring a derivative action on behalf of the corporation. And see Greer Investment Co. v. Booth, 62 F. 2d 321; Annotation, 168 A.L.R. 906, 914. It is suggested, however, that since the appellant-stockholders in their individual capacities, seek only a rescission of the sale of their stock to Black in 1944 and 1945 and do not seek to set aside the sale of the stock by Black to the N.C.R.A. in 1947, but instead seek to impress a trust upon the proceeds of that sale, they thereby affirmed the sale of the stock by Black, and having thus affirmed the sale, neither Black nor the appellants were thereafter either legal or equitable stockholders of the corporation; and not being stockholders were consequently without capacity to maintain the corporate causes of action.

When the appellants affirmed the sale of the stock to the N.C.R.A. in 1947 and recovered the proceeds from such sale, they indisputably ceased to be either legal or equitable stockholders and they obviously cannot there-

after assert a right of action as such. This is so, even though the wrongs complained of were committed while they were either legal or equitable stockholders. See Hanna v. Lyon, 71 N.E. 778; 3 Fletcher, Cyclopedia of Corporations, Sec. 1286, page 988. We therefore hold that the asserted corporate claims are not maintainable by these former stockholder-appellants. The question remains whether the corporate claims are maintainable by the receivers of this dissolved Illinois corporation.

The receivers of the corporation, standing as they do in the corporate shoes, have no greater right to sue or be sued than the corporation. From the date of its formal dissolution on July 1, 1947, the corporation ceased to exist as a legal person and was thereafter incapable of maintaining an action in the absence of enabling statutory authority. O'Neill v. Continental Illinois Co. et al, 93 N.E. 2d 160 (Ill. 1950); Oklahoma Natural Gas Company v. Oklahoma, 273 U.S. 257; United States v. Safeway Stores (10 Cir.), 140 F. 2d 834. Parg. 157.94 of the Illinois Business Corporation Act of 1933 (Chap. 32, Ill. Rev. Stat. 1949) provides that: "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

The manifest purpose of Parg. 157.94, supra, was to provide a grace period for winding up the affairs of the dissolved corporation during which it could sue and be sued on rights and liabilities incurred before dissolution. 16 Fletcher, Cyclopedia of Corporations, Sec. 8158, page 916; United States v. Safeway Stores, supra. But the statute is not one of limitations but a condition upon a right of action. See O'Neill v. Continental Illinois Co., supra, page 165. And the statutory words, "any remedy available . . . for any right or claim" necessarily embraces a right of action sounding in fraud.

The co-receivers' action was commenced on July 14, 1950, more than two years after dissolution, and is not within the two-year statutory grace period. The co-receivers intervened in the abortive stockholders' suit commenced within the two-year grace period, but at the con-

clusion of the evidence in the consolidated cases, they elected to stand on their original action. The election was coercive, but no point is made of it on appeal, and the receivers must therefore stand on that suit.

But even so, the order appointing the receivers specifically set aside and rescinded the corporate dissolution and adjudged it a nullity "for all purposes" until further order of the court. A copy of the order vacating the dissolution was forwarded to the Secretary of State of Illinois and the receivers were authorized and directed "to take all action that may be necessary or proper in this regard." On this record, that order is final and subsisting. It is a judgment of a court of competent jurisdiction of the parties and subject matter, is not void upon its face, and is therefore invulnerable to attack here. 16 Fletcher, Cyclopedia of Corporations, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; Town of Vandalia et al v. St. Louis, V. & T. H. R. Co. et al (Ill.), 70 N.E. 662; Blanchard Bro. & Lane v. S. G. Gay Co. et al (Ill.), 124 N.E. 616; Miller v. Union State Inv. Co. et al (Ill.), 61 N.E. 2d 764; Badger v. Hoidale (8th Cir.), 88 F. 2d 208. Indeed, no attack is made upon it in these proceedings. We conclude that Parg. 157.94 is inapplicable to these asserted causes of action by the co-receivers, and that the corporate causes are maintainable by them.

* * *

We come, then, to the corporate claim to the effect that Black surreptitiously and fraudulently procured the issuance to him of 32,457.50 shares of the corporation's common stock which he sold to the N.C.R.A. for $51.06 a share, and for which he is a constructive trustee and should be required to account. Black has denied these allegations and pleaded laches and the analogous limitations. It is incumbent upon the receivers, therefore, standing in the shoes of the corporation, to prove the claims of fraud by convincing evidence.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939 Black discussed with Ives his plan to organize a corporation so that they could operate "as a company instead of as an individual." In November of 1939, Black proposed to the board of directors of Landowners Association to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corpo-

ration in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who repasted them in the stock book. The stubs were not in secretary Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares

of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a notation "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were issued to him and Marshall in consideration of the transfer of the five Barton county oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the record is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1939 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $24,000.00 expended. $8,000.00 ($3,000.00 for the Krier lease and $5,000.00 on a drilling contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organization of

the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

The question, then, is whether the asserted corporate claims are barred by the Kansas statute of limitations or analogous laches.

Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." Sauberli v. Sledd (Kan. 1936), 55 P. 2d 415, 419, and cases cited; Dalton v. Hill (Kan. 1950), 219 P. 2d 710, 716; Lewis v. Duncan (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in Blazer v. Black, 196 F. 2d 139, 147. See Dalton v. Lawrence Nat. Bank (Kan. 1950), 219 P. 2d 719; Guilfoyle v. Brown (Kan. 1939), 88 P. 2d 1082; Hughes v. Reed (10 Cir.), 46 F. 2d 435; Curtis v. Connly, 257 U.S. 260, 66 L. Ed. 222, 42 S. Ct. 100; Annotation, 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, § 59, page 55; 41 Col. L. Rev. 686, *The Statute of Limitations in Suits to Remedy Corporate Abuse;* 47 Yale L. Journ., No. 6, 1004, *The Statute of Limitations as Applied to Stockholders' Derivative Suits.*

The appellees earnestly insist that the corporation had full notice and knowledge of the issuance of the challenged stock in consideration of the Barton County leases; that such knowledge was revealed to the stockholders and directors in each annual audit report, copies of which were

circulated to all of the stockholders and directors; that the minutes of each stockholders meeting subsequent to 1941 showed Black as the owner of the full amount of the challenged stock. That with such knowledge the corporation, by the affirmative acts of its stockholders and board of directors, approved and ratified the issuance of this stock, and that the corporation cannot now be heard to deny the knowledge of the fraud within the applicable limitations.

It is true that the first annual audit report of the company for the fiscal year ending July 31, 1940 and each succeeding audit report for the fiscal years from 1941 through the last eleven-month period ending June 30, 1947, showed as a part of the history of the corporation, the board of director's authorization for the issuance of 9,055 shares of preferred stock of the company and 122,500 shares of the common stock of the company, in exchange for the five Barton County, Kansas oil and gas leases. This authorization also included the assumption by the company of a liability existing against said leases in the amount of $8,827.93. And it is also true that the books of the company showed the fluctuations in stock ownership in Black from 11,000 shares (10,000 shares of common and 1,000 shares of preferred) in 1941 to 70,000 shares in 1942; then to 52,816 shares in 1943; 46,057 shares in 1944; 46,057.50 in 1945; the same amount plus 6,804 shares held jointly with his wife in 1946; and 6,804 shares in 1947, during which year the N.C.R.A. owned a majority of the authorized stock of the corporation. The minutes further revealed the adoption of a resolution by the board of directors in December of 1944, authorizing the company to purchase 38,978 shares of Deering J. Marshall stock, and the amendment of the by-laws authorizing Black, as president of the corporation, to purchase on behalf of the corporation all or any part of the outstanding capital common stock of Black-Marshall for the account of the corporation to be used as treasury stock or to be retired on the books of the company.

Unquestionably a corporation is chargeable with actual and constructive notice and knowledge of that which was brought home to it in the administration of the affairs of the corporation as reflected by its books and records; and it is charged with any information disclosed from an inquiry prompted by the face of the record. Farmer v. Standeven, 93 F. 2d 959 (10 Cir.); Connell v. Sinco Oil Co. (Kan. 1950), 223 P. 2d 1020. And notice to an officer of

the corporation in the line of his duty is usually notice to the corporation. Curtis v. Connly, supra; Hughes v. Reed, supra.

Black, of course, had notice and knowledge of the fraud from its inception, but such notice or knowledge is not imputable to the corporation, for he was certainly acting outside the scope of his authority and in direct derogation of the interests of the corporation. Indeed, the presumption is that he concealed such knowledge rather than that he communicated it to the corporation. 3 Fletcher, Cyclopedia of Corporations, Sections 819 and 820. There is nothing on the face of the minutes, audit reports, or records of the company to show that of the 122,500 shares of common stock of the company issued in exchange for the five Barton County leases, 64,870 shares were issued to Black for his and Marshall's interests therein. And there is nothing on the face of the records of the company to show that the stock listed in Black's name represented 32,457.50 shares of stock issued to him in consideration of his interest in these leases.

The audit reports did incite inquiry. Director James, acting on behalf of the Landowners' Group of stockholders, challenged the legality of the issuance of the 122,500 shares in exchange for the five Barton County leases in the early part of 1941 as violative of the stock ratio fixed in the preorganization agreement. His concern was in behalf of the Landowners' Group whose stock ownership was diminished by the issuance of the stock to Black. In explanation Ives suggested that all five of the leases were not included in the original agreement and that the additional stock was issued in exchange for the Hoffman and Krier leases. But this explanation was contrary to the facts, and indeed contrary to the recitations in the audit reports. The record shows that after the Landowners' Group challenged the issuance of this stock, James met Black in Wichita where Black made peace with him and his associates. The record does not indicate what arrangements were made between them. It does indicate that James resigned as director of the company in January, 1943, and that he and Black thereafter dealt in the stock of the company on friendly terms.

There were members of the Aledo Group on the board of directors throughout most of the history of the company until their stock was sold in 1945. There is nothing on this record to indicate that any of these directors or stock-

holders had actual notice of the inquiry conducted by James for the Landowners' Group or that any of them were moved to make any inquiry concerning the issuance of the stock or Black's ownership of the large quantity of stock appearing in his name on the stockholders' list at the annual stockholders' meetings. The audit reports, the minutes of the meetings and all other corporate records were available to all of the stockholders and directors. Indeed, the audit reports were circulated among and approved by the stockholders and by the directors. It may be suggested with good cause that the Aledo directors were put on the same inquiry as the Landowner's Group and that a reasonably prudent inquiry would have disclosed all of the facts relating to the issuance of the challenged stock to Black.

Undoubtedly one of the most important determinants of reasonable diligence for the purpose of discovery and accrual is the relationship of the parties. It is established Kansas law that the directors or officers of a corporation are not trustees of an express trust as to whom the statute of limitations is inapplicable, at least until repudiation; but they do stand in a fiducial relationship of trust and confidence to the corporation and its stockholders, and may be held to strict accountability as trustees of an implied or constructive trust resulting from fraudulent transactions with the corporation or its stockholders. Dalton v. Lawrence National Bank, supra; Hotchkiss v. Fischer (Kan. 1932), 16 P. 2d 531; Federal Reserve Life Ins. Co. v. Gregory (Kan. 1931); 294 Pac. 859; 3 Fletcher, Cyclopedia of Corporations, § 838, Pages 173-187. The duty to exercise reasonable diligence to discover fraud on the corporation by its fiduciaries certainly ought to be judged in the light of the duty of such fiduciaries to strictly account to the corporation touching their stewardship. Dalton v. Lawrence Nat. Bank, supra; Hotchkiss v. Fischer, supra. And see Marcus v. Otis (2d Cir.), 168 F. 2d 649. The law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty of the party committing the fraud to disclose the truth to the other. Auer v. Wm. Meyer Co. (Ill. 1944), 54 N.E. 2d 394. And there is very respectable authority for saying

that the statute of limitations is "tolled while a corporate plaintiff continues under the domination of the wrongdoers." See Michelsen v. Penney (2d Cir.), 135 F. 2d 409; 39 Col. L. Rev. 842, *The Statute of Limitations in Stockholders' Derivative Suits Against Directors.* In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made. Dalton v. Hill 219 P. 2d 710, 716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." Connell v. Saco Oil Co., 223 P. 2d 1020, 1027. See also Dalton v. Lawrence Nat. Bank, supra. In any event, it would be purely fictional and wholly inadmissible to require the corporation to suspect and investigate its president and dominant officer.

It is in this setting that we must ultimately judge whether the corporation discovered or should have discovered the fraud within the two years next preceding the bringing of this suit. Black not only occupied the position of director and dominant officer, he was a promoter of the corporation, in which capacity he also sustained a fiducial relationship which forbade him under penalty of strict accountability to take any unfair advantage or reap any secret profits to the detriment of the corporation or the stockholders. 1 Fletcher, Cyclopedia of Corporations, § 193; 13 Am. Jur., Corporations, § 115, page 254.

There can be no question of Black's complete domination of the corporation from its inception until he sold his stock to N.C.R.A. Nor can there be any question that Black acquired the 64,870 shares of promotional stock under circumstances which he never disclosed to the stockholders or the directors during the entire history of the corporation, and which he could not explain from the witness stand. We do not believe that the recitations in the audit reports or the information on the stock lists were sufficient to give either actual or constructive notice to the corporation of his fraud in the acquisition of the stock. The proof is that actual notice of the circumstances under which the stock was issued was not discovered until within two years before the suit was commenced, and it is therefore not barred.

We hold that the 32,457.50 shares of stock of the company issued to Black and sold by him to the N.C.R.A. in 1947

belonged to the corporation, and Black should be required to account. We cannot determine the exact value of that stock in relation to the total amount of stock entitled to participate in the proceeds of the sale of the company for we cannot determine from this record the total amount of stock entitled to participate in the sale. We do know that a part of the stock of the Aledo Group entitled to participate was retired prior to the 1947 sale. The participation of the retired stock in the sale of the company would pro tanto diminish the sale price of each of the shares of stock entitled to participate in the sale. These computations we must leave to the trial court.

Corporate Claims for Personal Profits Realized By Black From the Use of Corporate Funds

During the early history of the company, Black advanced money and credit to the company for the development of its properties. During the most prosperous days of the company, and particularly after the loan from the N.C.R.A. in 1945, Black borrowed large sums of money from the company with which he purchased company stock, a farm in Illinois, a commercial tuna boat on the West coast, and engaged in other commercial ventures for personal profit. The receivers, contending that these borrowings were unauthorized and illegal under the by-laws of the corporation, seek an accounting from Black for the profits realized from the use of corporate funds.

At all times from the inception of the company the company books reflected Black's advances to and from the company. A regular quarterly meeting of the board of directors on September 26, 1947 approved the advances to or for the account of Black in the sum of $1,293,009.59 prior to August 1, 1946. The trial court made specific findings for each year based upon the books of the company, to the effect that on June 30, 1947 Black owed the company $591,064.07 which he paid by his personal check at the time of dissolution. In 1946 the corporation had actual and constructive knowledge of these advancements and of Black's heavy indebtedness to the company. When Black settled his accounts with the corporation on June 30, 1947 the directors and the stockholders had knowledge of and necessarily approved Black's borrowings from the company. The Illinois statute makes it a criminal offense to vote for the making of a loan to an officer or director of the corporation. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(h). And the director of a corporation who

votes for the making of a loan to an officer or director is jointly and severally liable to the corporation for the amount of such loan until repaid. Ill. Rev. Stats. (1953) Chap. 32, Sec. 157.42(d). But while it may be criminal to vote for the making of a loan and the directors may be liable to the corporation for its repayment, it does not neeessarily mean that such loans are fraudulent or that a director is accountable to the corporation for the profits from such loans. 3 Fletcher, Cyclopedia of Corporations, § 955. These transactions are further evidence that Black dealt with the company as his own and without let or hinderance from the stockholders or other directors. But the trial court concluded that they had been approved and ratified by all of the stockholders of the corporation in June of 1947, and we will not say that the court's judgment in that respect is clearly erroneous.

The fourth and last corporate claim complained of Black's self-dealings with the corporation to its detriment and to the benefit of himself and Mrs. Black. Sometime in 1945 Black and A. W. Kincade caused the Ferrell-Young Drilling Company to be organized with Young, Ferrell, Mrs. Black and Mrs. Kincade as equal partners. This drilling company drilled wells for the Black-Marshall Oil Company and engaged in other drilling operations. Mrs. Black's reportable income from the partnership in the year 1946 was $38,000.00. In dealing with the corporation, Mr. and Mrs. Black were of course one and the same party. And equity will scrutinize the transactions of a fiduciary with a corporation in matters of this kind with extreme care to make sure that the transactions were at arms length and that the corporation suffered no detriment. Winger v. Chicago City Bank & Tr. Co. (Ill. 1946), 67 N.E. 2d 265; 3 Fletcher, Cyclopedia of Corporations, § 924, pp. 357-60. But the law does not forbid corporate officers from dealing with the corporation merely because they are such. Such transactions are not inherently dishonest or invalid for that reason alone. 3 Fletcher, Cyclopedia of Corporations, § 885, page 283; § 913, page 329; § 917, page 337. The record shows without dispute that it is the custom for companies like Black-Marshall to independently contract for the drilling of their wells and that the Ferrell-Young Drilling Company was paid the prevailing price in the field for its drilling operations; that Ferrell and Young were experienced drillers and that it was to the interest of the corporation to have the benefit of their experience in the

corporation's drilling operations. While the trial court did not make findings in that respect, we take the view that the transactions were not fraudulent and that the corporation suffered no detriment, and we will not require Black to account.

Black was also the owner of a "drilling-in unit" which he rented to the company on a per diem basis, but the evidence shows without dispute that the rental was fair and in accordance with the prevailing practice at that time and place, and Black is not required to account for his profits.

In 1945 and 1946, Black, acting as president and managing officer of the corporation, conveyed undivided interests in oil and gas leases of Black-Marshall to A. W. Kincade with the express understanding with Kincade that Kincade would account to him for a half interest in the profits derived from these properties and that upon demand he would convey an undivided one-half interest in such properties. And other undivided interests in other properties were conveyed to Mrs. Black. None of these properties were sold to N.C.R.A. and in 1948 upon demand Kincade conveyed an undivided one-half interest to Black. There can be no doubt of the fraudulent character of these particular transactions. Black first denied it, and then admitted it, and he should be required to account.

Finally the receivers seek to recoup the profits realized by Black from the sale of company properties to William F. Pielsticker for Black's account. After the N.C.R.A. had become the dominant stockholder in the company and the stockholders had voted on June 27, 1947 to voluntarily dissolve the corporation, a special meeting of the board of directors passed a resolution providing "that all accounts receivable due the Black-Marshall Oil Company by the Landowners Oil Association and all stock in the Landowners Oil Association be sold to Wm. F. Pielsticker for the sum of $53,183.91; that all producing gas leases in Kearny County, Kansas, and all oil and gas leases and mineral interests in the State of Texas owned by the Black-Marshall Oil Company be sold to Wm. F. Pielsticker for the sum of $58,115.10; and that one model D-18 Beechcraft twin engine airplane be sold to Wm. F. Pielsticker for the sum of $46,152.56." While the record does not show the exact manner of payment for these properties, it does speak of a Voucher No. 6-428 dated 6-30-47 reciting the "sale of the properties to Pielsticker for $157,451.57 based

on values shown in Bradley report at 3-31-47. Selling price as provided in minutes of directors 6-30-47." The minutes of the board of directors meeting authorizing the sale were apparently attached to the voucher together with a schedule showing the cost of the Kearny County gas properties in excess of $47,633.71 "to be charged to Pielsticker in exact amount." These properties were not transferred to the N.C.R.A. and apparently were not included in the valuation of the properties for the purpose of determining the sale price for the stock sold to the N.C.R.A.

These properties were sold in contemplation of corporate dissolution. They were sold to Pielsticker admittedly for Black's account, so that it may be said that Black was in reality the purchaser. We can see nothing inherently dishonest or fraudulent in Black's purchase of the corporate properties on dissolution provided that he paid full value therefor. The record shows that the cost basis for the Kearny County gas properties to the corporation was $47,633.71 and that they were sold to Pielsticker for Black's account for $39,449.78, but there is nothing in this record from which we can determine that the properties were worth more than their sale price. Indeed, there is nothing in the record to show or tending to show that any of the properties sold to Pielsticker were worth more than what he paid for them. But even so, they were sold by the corporation in pursuance of a resolution of the board of directors setting out the exact amounts for each of the properties sold. There was nothing secret or surreptitious about the transaction except the properties were bought by Pielsticker for Black's account, and while the reasons therefor do not appear, we think it immaterial if, as we have seen, the corporation received full value for the properties sold. It is significant, also, that the properties were sold after the N.C.R.A. had become the dominant stockholder and was in the process of dissolving the corporation. It was of no concern to the corporation who acquired the properties if full value was paid. No accounting on these particular transactions is indicated.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

PHILLIPS, *Chief Judge*, dissenting:

I respectfully dissent from that part of the opinion which holds that the receivers of the Black-Marshall Oil Company[1] were entitled to recovery in part on the corporate cause of action, for the reason that, in my opinion, the corporate cause of action was wholly barred by the Kansas statute of limitations and by laches.

In January, 1940, certificates of stock in BM were issued to Black, et al.[2] covering an aggregate of 64,870 shares. The original five directors of BM were Black and Marshall and three members of the Aledo group: Ives, Boyd and Stevenson. At the next annual meeting of the stockholders, held in January, 1941, Black and Marshall and five members of the Aledo group; namely, Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected to the board of directors. At the annual meeting of the directors, also held on January 17, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the board of directors authorized the issuance of 122,500 shares of common stock, which included the 64,870 shares of stock to Black and Marshall, in exchange for five leases and the assumption by the corporation of liability existing against the said leases in the amount of $8,827.93. At the next annual meeting of the board of directors, held in January, 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Allen James of the Chicago group, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo group and Ranney of the Chicago group, an audit report for the year ending July 31, 1942, was examined and approved. That report also showed the issuance of the above mentioned

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[1] Hereinafter referred to as BM.

[2] Marshall was the beneficial owner of approximately half of such stock.

stock. Like audit reports, examination and approval covering subsequent years were presented, examined and approved at stockholders' meetings held in January and December, 1944.

The minutes of the annual meeting of the stockholders of BM, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares. The same may be said with respect to the minutes of the stockholders' meeting, held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of stockholders held on December 6, 1944, the stockholders adopted a resolution authorizing a purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons embraced in the Aledo group.

It seems to me that the written records referred to above conclusively establish that the directors and stockholders knew in December, 1944, and prior thereto that the 64,870 shares of stock had been issued to Black and Marshall in exchange for their interest in the Kansas leases.

The trial court found that the 64,870 shares were issued to Black, et al. for the partnership interest of Black and Marshall in the original five Kansas leases and that the corporate records reflected that fact.

The trial court, in addition to its specific findings of fact, found all other issues of fact in favor of the defendants and against the plaintiffs.

The corporate cause of action was commenced by the receivers on July 14, 1950, at least more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that the 64,870 shares had been issued to Black and Marshall.

For the reasons indicated, it is my opinion that the corporate cause of action, insofar as it was predicated on the issuance of such 64,870 shares of stock, was barred by the statute of limitations and by laches.

JUDGMENT—(Vacated by order of May 4, 1956)

Eighth Day, November Term, Friday, November 25th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

ORDER WITHDRAWING OPINION FILED NOVEMBER 25, 1955, AND VACATING JUDGMENT ENTERED NOVEMBER 25, 1955

Eighteenth Day, March Term, Friday, May 4th, 1956.

Before Honorable Orrie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

It is now here ordered by this court that the opinion of the court filed November 25, 1955, be and the same is hereby withdrawn, and that the judgment entered November 25, 1955, be and the same is hereby vacated.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 4962, 4963, 4964—March Term, 1956

Appeal from The United States District Court For The District of Kansas

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A. M. AMEN, et al, APPELLANTS,

vs.

WILLIAM H. BLACK, APPELLEE.

A. M. AMEN, et al., APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

D. ARTHUR WALKER and FRED D. WINDISH, Co-Receivers of Black-Marshall Oil Company, APPELLANTS,

vs.

WILLIAM H. BLACK and RUTH F. BLACK, APPELLEES.

(May 4, 1956)

D. Arthur Walker and Martin M. Lucente (Jack O. Brown, Burrel Barash, Robert Martin, Edward G. Knowles, W. F. Lilleston, Douglas F. Smith and Henry V. Gott were with them on the brief) for Appellants;

Malcolm Miller (George B. Powers, Carl T. Smith, John F. Eberhardt, Stuart R. Carter, Robert C. Foulston, Robert N. Partridge and Robert M. Siefkin were with him on the brief) for Appellees.

Before PHILLIPS, *Chief Judge,* and MURRAH, *Circuit Judge, and* WALLACE, *District Judge.*

MURRAH, *Circuit Judge.*

Stripped of their duplicity and redundancy, the pleadings in these consolidated cases state four separate contested claims with a common factual background.

The first is a suprious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders.

The third claim asserted by the corporate receivers is for a recovery of the profits allegedly realized by Black and his wife from the use of company funds in personal business ventures. The fourth claim is also for proceeds realized by Black in transactions in which company funds were used for personal profit. This appeal is from a judgment of the trial court in favor of the defendants on all tendered issues.

A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellees challenge the pro-

priety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.

The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. Shipley v. Pittsburgh & Lake Erie Ry Co., 40 F. Supp. 870; Dickinson v. Burnham, 2 Cir., 197 F. 2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted: See Vol. 3, Moore's Federal Practice, p. 3448.

In a similar action by one of the Aledo Group of investors, we sustained the maintainability of the suit and thought that the plaintiff's proof standing alone showed that "Black did devise a scheme to defraud the stockholders of Black-Marshall . . . and that Ives was Black's agent in the perpetration of that scheme." Blazer v. Black, 10 Cir., 196 F. 2d 139. Based upon substantially the same pattern of proof, the trial court in this case made separate findings of fact with respect to the claims of specifically named appellants in which it found that in the summer of 1944 Ives falsely represented to these named appellants that the producing properties of Black-Marshall were being sold for an amount sufficient to yield the stockholders $10.00 per share; that the undeveloped properties of the company were being retained for development at a later propitious time; and that the stockholders should surrender fifty percent of their stock in order to bind the transaction. The court further found that in 1945 Ives falsely represented to the same appellants that the producing properties of Black-Marshall had been sold for which they should surrender the remainder of their stock for $12.00 per share. These representations were conced-

edly false and undoubtedly induced the stockholders to part with their stock. The trial court further found, however, that Black did not solicit Ives to make such false representations and had no knowledge that they were being made as an inducement for the surrender of their stock. It was upon this basic finding that the trial court concluded that Ives was not Black's agent in the procurement of the stock; that Black was not therefore legally responsible for the false representations; and that he made no fraudulent representations to any of the plaintiffs and did not practice any fraud on any of them.

With respect to certain other specifically named appellants, hereafter noted and treated, the trial court found that no representations of any kind were made by anyone to induce them to part with their stock.

We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. United States v. United States Gypsum, 333 U.S. 364; United States v. Waymire, 10 Cir., 202 F. 2d 550; McAllister v. United States, 348 U.S. 19; United States v. Oregon Medical Society, 343 U.S. 326.

The pertinent facts are that in 1938, Black, an oil promoter, went to Aledo, Illinois where he met a well-respected lawyer named Ives. Through Ives he met some of the appellants, business and professional men and women living in and around Aledo. As a result of these contacts, Black, with Ives as his lawyer, formed the Petroleum Investment Company, a voluntary association through which Black entered into separate contracts with the investors providing in substance that Black would use the funds entrusted to him by the respective investors in exploration for oil. The contracts in identical terms provided that Black would receive one-fourth of the profits from the ventures and that he would have unlimited powers of management of the affairs of the respective ventures.

Acting through Ives as his attorney and agent, Black received approximately $21,000.00, most of which came from the appellants herein. These funds were unsuccessfully invested in several oil ventures in Southern Illinois. In the

early part of 1939, Black left Aledo apparently for California. While enroute, he was involved in an automobile accident and awoke in a Tulsa, Oklahoma hospital to find Deering J. Marshall at his bedside. He had had previous dealings with Marshall, and while convalescing in Tulsa, he and Marshall made arrangements to acquire some oil leases in Barton County, Kansas. The first lease, known as the Esfeld, was acquired by Marshall as a farmout from the Sohio Oil Company with funds furnished by Black. A producing well was completed on the lease in the early part of July. Thereafter Black and Marshall working together acquired four other leases in Barton County, Kansas, known as the Weber, Dolechek, Hoffman and Krier. These leases were partially developed as producing properties during the latter part of 1939.

While the leases were being acquired and developed, Black commenced negotiations with the Landowners Oil Association, composed of a group of Chicago investors, looking toward the pooling of the resources of the two companies into a corporation, the stock of which would be divided between the investors in the two groups based upon the value of their respective assets. During all of these negotiations Black kept Ives advised of all developments, including the five oil and gas leases in Kansas, and on December 7, 1939 rendered a financial statement to Ives setting out the receipt of the money from the Aledo Group, its investment and results.

Pursuant to plan, the Black-Marshall Oil Company was incorporated by Ives on January 3, 1940 as an Illinois corporation with an authorized capital of 20,000 shares of cumulative preferred stock with a par value of $10.00 and 200,000 shares of no par common. Stock was issued to the Aledo investors on a basis of one share of common for every $2.00 invested and one share of preferred for every $4.00 invested, including the amounts invested in the unsuccessful Petroleum Investment Company ventures in Southern Illinois. The five producing leases in Barton County, Kansas, together with other unproductive holdings were transferred to the corporation by Black and his associates, and the assets of the Landowners Association were also transferred to the corporation in consideration of 2,000 shares of preferred and 20,000 shares of common stock of the newly formed corporation. Black, Marshall and Ives were each issued 10,000 shares of common and 1,000 shares of preferred. At the first stockholders meet-

ing in Aledo, Black was elected president, chairman of the board and chairman of the executive committee, and Ives was elected secretary and treasurer. Both acted in these capacities from the organization of the corporation to its dissolution upon the sale of its outstanding stock in 1947 to the National Cooperative Refinery Association. Some of the appellants here became directors of the corporation and remained such throughout the life of the corporation. The company first maintained offices in Wichita, and later in Great Bend, Kansas, near the location of the producing properties. The minute books of the corporation were kept by Ives in Aledo where the first meetings were held, but were later moved to Great Bend, Kansas where the company offices were maintained.

The productive leases in Kansas were developed from 1940 to 1944 primarily with bank loans negotiated by Black with company credit and security. The leases were prolific and at the January, 1944 board meeting in Aledo, there was considerable agitation for a dividend or at least a partial return of investment in some form. Black explained that no dividends could be paid while the drilling program was under way, and that in any event it would not be advisable taxwise because the drilling operations were being carried on largely with tax money. Several resolutions and substitute resolutions were offered looking toward a partial realization upon the investment. Finally a resolution was adopted authorizing Black to negotiate a sale of the producing properties for an amount to yield the stockholders at least $8.00 per share and providing that the nonproducing properties would be retained for future development. Thereafter, and in the Spring of 1944, Black attempted to sell the producing properties of the company and entered into a tentative arrangement with N.C.R.A. for a loan secured by fifty-one percent of the company. When these negotiations failed, Ives wrote Black on May 14, 1944 expressing his regrets and also expressing the hope that they could make "some kind of a deal so that we can pay them [the stockholders] some money by the first of June, as they are expecting something at that time." He went on to say, "I am going to send you 440 shares of common stock which I purchased for you at $10.00 per share, but the owner must have his money by the 30th day of May", and that "I may be able to buy more of the stock at that price if you want it." A few days later, Black wrote Ives outlining his negotiations

with N.C.R.A. expressing the view that he would eventually be able to make some kind of satisfactory arrangements with the co-op and asking Ives to prepare a directors' authorization "to consummate a deal with the co-op". Referring to the purchase of the stock of the Aledo Group, Black told Ives that it would not be possible to do anything by June 1, but that if they would sign a sales agreement giving him sixty days, he felt sure he could get the stockholders $10.00 a share. He was confident that he could secure a market for the stock provided there would be enough shares to "interest a purchaser who would be willing to make an investment substantial enough to warrant his taking some active part in the company." He referred to the arrival "next week" of some friends of Arthur Kincade from New York who were interested in such an investment. Ives was asked to write or wire the number of shares he thought could be acquired in Illinois so that Black would have some idea of what he would be able to offer the prospective purchasers.

Thereafter, and beginning in June of 1944, Ives contacted all of the Aledo Group, appellants here (except those hereafter noted) advising them that the producing properties of the company had been sold for an amount sufficient to return $10.00 per share, and that a deposit of fifty percent of the stock was necessary to evidence good faith; that the undeveloped properties of the company would be retained for development at a later propitious time.

When Ives had acquired fifty percent of the stock holdings of the Aledo Group at $10.00 per share, Black sent the company plane from Great Bend to Illinois and Ives delivered the stock to Black at Great Bend. 25,000 shares of stock were immediately transferred, 10,000 to Edward Roos, 10,000 to Richard Gill, and 5,000 to Arthur Kincade. The proceeds of this sale in the sum of $258,750.00 were transferred to Ives' stock account in Aledo. The remaining 11,714 shares were placed in Black's lock box as street stock. $80,121.64 of Black-Marshall funds were used to pay for this stock. It was first charged to Ives' account on the company books but was later charged to Black's account. The total purchase price was transferred to Ives' stock account in an Aledo bank from which the individual stockholders were paid at the rate of $10.00 per share. Apparently nothing further was said to the Aledo Group concerning the progress of the supposed sale, or for that matter, the progress of the company,

until the following Summer of 1945, when Ives told the Aledo Group that the Black-Marshall Company had now been finally sold and that the stockholders should surrender the remainder of their stock to be paid at the rate of $12.00 per share.

Pursuant to these representations, the remainder of the stock was delivered to Ives and by Ives delivered to Black, who paid for it with Black-Marshall funds by separate vouchers to each of the stockholders. At this point in the course of events Black had in his possession and in his lock box the 11,714 shares of street stock acquired in 1944, the remaining one-half of the stock of the Aledo Group, and also 15,000 shares of Gill and Kincade stock which he had purchased with company funds for $17.50 per share. At about the same time Black negotiated a $3,200,000 loan with the N.C.R.A. under which Black-Marshall agreed to drill twelve producing wells each year for five years for an additional loan of $22,000.00 for each producing well so drilled. The company continued to prosper under the accelerated drilling program.

In preparation for the sale of a majority of the company stock to the N.C.R.A. in 1947, Black retired 56,000 shares of the street stock held in his lock box and thereby balanced his account with the company for the purchase price. With the 11,714 shares of Aledo stock transferred to himself in 1946, he then held in his name or in the name of his family 62,126 shares which he sold to N.C.R.A. for $51.06 a share. In addition, 3,000 shares held by Ives as executor of the Boyd Estate were also transferred to the N.C.R.A. for the same consideration per share. This gave N.C.R.A. a controlling stock interest, and it thereupon proceeded to dissolve the corporation, the other stockholders agreeing to convey their interest in the assets to N.C.R.A. for an amount equal to the $51.06 per share. Under the agreement of sale some of the company assets which the N.C.R.A. did not wish to acquire were sold to Black. The assets of the Landowners Oil Association were transferred to Black for the amount of the accounts receivable due the Black-Marshall Oil Company. From the total consideration of the sale of the stock to the N.C.R.A., Black and his wife received $234,928.74, Black individually $2,814,929.06, and Ives as executor of the Boyd Estate $135,930.00. In addition, an escrow fund of $497,819.21 was created of which Mrs. Black's interest

was $39,123.29, Black's interest amounted to $357,224.50, and the Boyd Estate interest was $17,250.00.

It is suggested that Black purchased the stock upon the insistent demands of the Aledo Group; that he was hard put to find a buyer and this prompted him to use company funds to purchase the stock. It is true that in the Spring of 1944, Ives was being urged to find a market for the stock of some of the distressed investors and that Ives was in turn pressing Black for relief. And, it seems also fair to say that at that time Black was hard put to find a buyer for the stock. But it is also manifestly clear, we think, that sometime in May or June of 1944 Black did find a market, and that market was in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan. Henceforward Black became anxious to purchase all available stock, and Ives gathered in all of the stock of the Aledo Group and delivered it to Black, according to what we believe to be a well-laid plan. The whole course of events is inconsistent with the idea that Black purchased the stock in response to the sporadic demands of the stockholders.

It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, "although the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment." 2 Am. Jur., Agency § 363; see also Restatement Agency § 261; Anheuser-Busch v. Grovier-Starr Produce Co., 128 F. 2d 146; Cox v. Pabst Brewing Co., 128 F. 2d 468; Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, "if those represen-

tations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized." 2 Am. Jur., Agency § 362; see also Restatement Agency, Sections 257, 258.

Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black.[1] In their brief

[1] Examples of Black's knowledge of Ives' misrepresentations to members of the Aledo Group and consequent ratification are: (a) Between the time the first one-half of appellants' stock was acquired and the acquisition of the second one-half, Black made the same general representations to Sherrard, specifically mentioning that only "producing properties" were being *sold*, and that undeveloped properties of Landowners were being retained "and this property that we weren't selling, we had to keep for a period of two years." (b) In the early Fall of 194[illegible] when Dr. Wadleigh wrote Black inquiring into the details of the transaction, Black asked Ives what should be said. In response Ives wrote Black: "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing." (c) When the Constants inquired of Black on November 21, 1945, Black failed to make a true disclosure, but wrote the Constants that the details were so complicated he would have to talk with them in person when he came to California "over the holidays". Conveniently, Black never looked up the Constants or made any effort to convey the true facts to them regarding the *sale*. (d) All acquired stock was kept in Black's lock box and was subject to his absolute control, yet he failed to take any steps to correct such misrepresentation, at a time when it would have been a simple matter to correct things with the shareholders. Indeed, with such knowledge, he transferred to himself under Certificate No. 398, 11,714 shares of stock which had been held in his lock box as street stock since 1944.

the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, "he ratifies who does not restore." Maryland Casualty Co. v. Beebe, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account. The record is barren of any benefits to Ives.

Quite apart from the naked principles of agency, we think there are even stronger reasons for holding Black responsible for the misrepresentations which induced the Aledo Group to part with their stock. The evidence conclusively shows that Black himself stood in a position of trust and confidence to the Aledo Group and he cannot insulate himself from the fraud by denying Ives' agency. From the very beginning the Aledo investors entrusted their funds to Black with unlimited powers of management. When the Group was incorporated for the continuation of their joint venture, Black became the president, chairman of the board and chairman of the executive committee. True, some of the Aledo Group were made directors of the company, but they took no part in the management of its affairs. For all practical purposes Black was the corporation; he did with it as he saw fit, and the stockholders followed him with almost blind loyalty, as evidenced by the facility by which Ives was enabled to obtain almost fifty percent of their stock in 1944 and the remainder in 1945. Ives was, in the last analysis only the conduit through which Black dealt with the Aledo Group. Having established this confidential relationship, he owed them the duty at least to be truthful with respect to all corporate transactions. Whether we apply the Kansas strict accountability rule, see Blazer v. Black, 10 Cir., 196 F. 2d 139, or the less stringent rule applicable in Illinois, see Agatucci v. Corradi (Ill.), 63 N.E. 2d 630; Dunnett v. Arn, 10 Cir., 71 F. 2d 912, equity will not condone fraudulent representations under which one standing in a confidential relationship is enabled to take advantage of another. See Auer v. Wm. Meyer Co., et al., 322 Ill. App. 244, 54 N.E. 2d 394. In these circumstances, equity prescribes a standard of rectitude quite above the ethics of the bargaining counter. 54 Am. Jur., Trusts, Sections 220, 225 and 226; Securities and Exchange Commission v. Chenery, 318 U.S. 80; Manufacturers Trust Co. v.

Becker, 338 U.S. 304. It will intervene to declare the wrongdoer a trustee and hold him accountable for the fruits of his inequitable conduct. Falk v. Hoffman (New York), 135 N.E. 243. In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945. Dunnett v. Arn, supra, at Page 920; Blazer v. Black, supra.

Appellees say that in any event the value of the stock of the company in 1944 and 1945 was not more than that which the Aledo Group received, and having received the full value of their stock they could have no complaint. The trial court so found and so held. But the value of the stock at the time it was fraudulently obtained is not the measure of relief in equity. Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. Dunnett v. Arn, supra, Blazer v. Black, supra; Falk v. Hoffman, supra. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it.

Reverting now to those parties to the suits who were beneficially excluded from the trial court's affirmative findings of misrepresentation on the part of Ives, we must consider each claim upon its own factual footing and of course accord due weight to the negative findings of the trial court with respect to those particular parties. Hokin, Jones, Bowers, Nelson, Elving and Ogle did not appeal from the adverse judgment and their claims are not before us. With respect to the parties falling within this category who have appealed and who may be classified as members of the Aledo Group, we ought to consider the correctness of the findings and conclusions of the trial court against the factual background of Ives' established relationship to the Group. It is important to keep in mind the fact that to most of the appellants he was a personal friend, attorney and confidant. And it was through this relationship that the Aledo Group was induced to purchase stock, first in the Petroleum Investment Company and later in the Black-Marshall Company; and it was through this same confidential medium that he was enabled

to marshall one-half of the stock in 1944 and the other half in 1945, in consummation of what we hold to be Black's scheme to defraud. We have the oral and written word of Ives that he made the same representations to all of the Aledo Group of investors whom he contacted in the effectuation of the scheme. Indeed, the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance.

Ives had no direct contact with either Amen or Baldwin. Amen lived in Yankton, South Dakota. Baldwin lived in Rock Island, Illinois. All of their transactions with Black-Marshall were through Dr. Danford, a prominent member of the Aledo Group and a large stockholder. It was through Dr. Danford that both Amen and Baldwin were induced to purchase stock. Baldwin left his stock in Danford's lock box. Ives was an old and trusted friend of Danford, and when in June of 1944 Ives set out to acquire one-half of the stock of the Aledo Group he immediately contacted Danford and by false and fraudulent representations induced him to part with one-half of his stock. At the same time he induced Danford to procure Amen's and Baldwin's stock. Pursuant to these directions and representations, Danford did secure their stock along with his own. Whether Danford acted as Ives' agent or as agent for Baldwin and Amen, they undoubtedly relied upon Ives' false representations to Danford, and as we have said, Black is liable for the misrepresentations of his agent, Ives, to Danford. See Restatement, Agency § 315.

Testifying in her own behalf, Edith Hall told substantially the same story as other appellants whose testimony was credited in the court's affirmative findings of misrepresentations. It is true that her memory failed her on cross examination, but we have Ives' word that he made the same representations to her as to other members of the Aledo Group whose testimony has been credited in accordance with the established pattern of proof. We think there can be no valid exception to Mrs. Hall's claim when considered in the context of the whole record.

McBride did not testify in his own behalf and the only proof of actionable misrepresentation is Ives' general statement to the effect that he made the same representations to all of the Aledo Group, including McBride. In the absence of any direct proof of fraudulent misrepresentations

or reliance upon the general pattern, we will not overturn the trial court's findings in that regard.

We hold, therefore, that appellants Amen, Baldwin and Hall are entitled to participate in the proceeds of the sale of the company in proportion to their equitable stock holdings at the time of the sale along with the other appellants as to whom the trial court found Ives made misrepresentations, and as to whom we have said Black was liable as responsible principal and unfaithful trustee.

This brings us to the corporate claims, and more particularly to the right of Black to participate in the proceeds of the sale to the N.C.R.A. on the basis of the 32,457.50 shares of stock which the appellants contend should be denied participation because fraudulently issued to Black as a promoter's illegal secret profit.

Inasmuch as the appellants do not seek to set aside the 1947 sale of stock to the N.C.R.A. by Black, but rather to impress a trust upon the proceeds of the sale, and constitute Black as trustee therefor, they ceased to be either legal or equitable stockholders upon the consummation of the sale, and consequently have no capacity to maintain a derivative action on behalf of the corporation for the redress of corporate wrongs. This is true, even though the wrongs complained of were committed while they were either legal or equitable stockholders. Hanna v. Lyon, 71 N.E. 778; 3 Fletcher, Cyclopedia of Corporations, Sec. 1286, page 988.

And while the corporate receivers may have capacity to maintain the suit on behalf of the dissolved corporation because of the invulnerability of the order of the Illinois Federal Court setting aside the corporate dissolution; 16 Fletcher, Cyclopedia of Corporations, Sec. 7764, page 223; 19 C.J.S., Corporations, Sec. 1693, pp. 1460-1; Town of Vandalia et al v. St. Louis, V. & T.H.R. Co. et al (Ill.), 70 N.E. 662; Blanchard Bro. & Lane v. S. G. Gay Co. et al (Ill.), 124 N.E. 616; Miller v. Union State Inv. Co. et al (Ill.), 61 N.E. 2d 764; Badger v. Hoidale (8th Cir.), 88 F. 2d 208; yet equity, looking at the substance of the proceedings, will make sure that the beneficiaries of the corporate redress are equitably entitled to the fruits of its processes. In the language of Judge Pound in Home Fire Ins. Co. v. Barber, et al (Nebr.), 93 N.W. 1024, 1033: ". . . When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceedings, and, if the beneficiaries of the judgment

sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result."

Looking at the substance of the corporate claims and the beneficiaries thereof, it becomes readily apparent that the principal beneficiary of any recovery on behalf of the corporation would be the N.C.R.A. who became the principal stockholder upon the purchase of a majority of the stock in 1947. And having purchased the stock of the corporation from Black in an arms length transaction, and having received the full value of its purchase, any recovery as stockholder beneficiary of the dissolved corporation would be tantamount to recoupment of the legitimate purchase price of the stock. Obviously there are no equities in such a result, and we therefore hold that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery. And see Home Fire Ins. Co. v. Barber, supra.

But the failure of the corporate claims in nowise militates against the standing of the former stockholders entitled to participate in the proceeds of the sale from contesting the right of Black or anyone else to participate in the fund which equity has created by raising a trust and constituting Black as trustee therefor ex malificio. The appellants, former stockholders, seek to set aside the issuance of 32,457.50 shares of stock to Black on the grounds that they were fraudulently issued to him, and thus recover the proceeds of the sale of that stock for themselves and those equitably entitled to participate therein. They sought relief through the medium of the corporation. But looking at the real parties in interest to the fund, equity will recognize the standing of the beneficiaries to contest the rights of others also claiming an interest by virtue of stock ownership at the time of the 1947 sale. The court has jurisdiction of the proceeds of the sale; it has jurisdiction of the parties; and Black is being required to account to the defrauded stockholders as equitable owners of the stock he sold to the N.C.R.A., as an incident to equitable accounting and the achievement of complete justice. The court may assuredly determine the rightful ownership of all the stock entitled to participate in the proceeds of the 1947 sale, and in so doing, it will not be restrained by mere forms of action or niceties of plead-

ings. See 30 C.J.S., Equity, Sections 67 and 68, pp. 414-421; 19 Am. Jur., Equity, § 127, page 126.

The facts leading up to the organization of the corporation in January of 1940 and the issuance of the stock are reasonably clear to the effect that sometime in the early Fall of 1939, Black discussed with Ives his plan to organize a corporation so that they could operate "as a company instead of as an individual". In November of 1939, Black proposed to the board of directors of Landowners Association to take 4,000 shares of preferred and 40,000 shares of common stock of the proposed corporation in full payment of the properties held by Black and "his associates" to be transferred to the corporation, including the five Barton County, Kansas oil and gas leases. When the corporation was organized by Ives in Aledo in January, 1940, these five Barton County, Kansas oil and gas leases were formally transferred to the corporation. The properties of Landowners were also transferred in consideration of 20,000 shares of common and 2,000 shares of preferred stock of the newly formed corporation. The number one stock certificates for 10,000 shares of common stock and 1,000 shares of preferred stock were issued to Black. Certificates numbered two for like amounts were issued to Marshall; certificates numbered three for like amounts were issued to Boyd; and certificates numbered four for like amounts were issued to Ives. At the same time the Aledo Group were issued preferred and common stock on the basis of one share of common stock for each $2.00 invested with Black prior to the formation of Black-Marshall and one share of preferred stock for each $4.00 so invested. These certificates were signed by Black as president and Ives as secretary. Certificates numbered 5 to 14, inclusive, in the total amount of 64,870 shares of common stock were issued to "W. H. Black et al" and signed by Black but not by secretary Ives. Revenue stamps were affixed and cancelled. When one of the former stockholders in the Landowners Group discovered that this large block of stock had been issued to "Black et al", he complained of the issuance of the stock as a violation of the preorganization agreement fixing the ratio of the stock ownership in the new company based upon the respective properties transferred. Sometime thereafter these stock certificates (5 to 14, inclusive) were repasted into the stock book. No one came forward to say who issued the certificates, under what circumstances, or who re-

pasted them in the stock book. The stubs were not in secretary Ives' handwriting. Black testified that upon the formation of the corporation he signed all of the stock certificates in blank and could not explain how they happened to be issued to him. He denied that they had been validly issued to him, or for that matter that they had been validly issued at all.

The minutes of the first annual stockholders meeting held at Aledo, Illinois, January 17, 1941 over which Black presided, showed that he owned 11,000 shares of the corporation stock (1,000 shares of preferred and 10,000 shares of common). Apparently, however, immediately after that meeting the "Black et al" stock was reissued as certificates numbered 155 to 166, inclusive. Each certificate, signed by Black as president and Ives as secretary, contained a notation "correction of name only". When Black was pressed for an explanation concerning the circumstances under which the 64,870 shares of stock were reissued to him, he simply stated, "I don't propose to explain it, because I can't explain it, sir."

Black now contends that the 64,870 shares of stock were issued to him and Marshall in consideration of the transfer of the five Barton County oil and gas leases which they had acquired and partially developed as a partnership, independent of the Aledo investors. But the undisputed facts are that the five Barton County leases were transferred to the corporation in consideration of 40,000 shares of common and 4,000 shares of preferred stock and that this same amount of stock was represented by the first four certificates issued to Black, Marshall, Boyd and Ives. They thereby received the full consideration for the five leases in accordance with the preorganization agreement. There is no evidence whatever that Black contributed anything else to the corporation for which he and Marshall would be entitled to receive 64,870 shares of stock. We do not understand anyone to so contend. Moreover, the evidence shows without dispute that beginning in the early fall of 1939, the Aledo Group transmitted funds to Black through Ives and that these funds were used for the acquisition and development of the five leases. It is true that the Esfeld lease was acquired in July and a well drilled thereon during which time Black did not receive any funds directly from the Aledo Group. And Black undoubtedly used outside funds with which to acquire the lease and drill a well thereon. But the rec-

ord is also clear that Black acknowledged the Aledo Group's interest in all of these leases. On December 7, 1949 he made a detailed report to Ives of monies received and spent in the acquisition and development of these valuable leases. The report showed that as of that date the Aledo Group had contributed $17,650.00 of a total of $28,415.00 expended. $8,000.00 ($3,000.00 for the Krier lease and $5,000.00 on a drilling contract) was due and unpaid and apparently was assumed by the corporation upon its organization in January, 1940. Other sums were contributed by the Aledo Group between December 7, 1939 and the date of organization of the corporation; and in answer to interrogatories, Black acknowledged receipt of approximately $30,000.00 from the Aledo Group, all of which was used in the acquisition and development of these five leases.

From these facts it is clear that each party received stock consideration for his investment in accordance with the preorganization agreement. The Landowners Association received their stock; Black, Marshall, Boyd and Ives received their stock for their interests in the Barton County leases; the Aledo Group received stock for their investment; and the 64,870 shares, of which 32,457.50 were issued to Black and sold to N.C.R.A., could be nothing but purely promotional stock. And it is also clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently, to Black.

Nor do we believe that the asserted claims are barred by the Kansas statute of limitations or analogous laches. Under the Kansas statute, an action for relief on the grounds of fraud may be brought at any time within two years after accrual; and it does not accrue until the discovery of the fraud (Sec. 60-306, Kan. Gen. St., 1949) meaning the "discovery of such facts as would on reasonable diligent investigation, lead to knowledge of the fraud." Sauberli v. Sledd (Kan. 1936), 55 P. 2d 415, 419, and cases cited; Dalton v. Hill (Kan. 1950), 219 P. 2d 710, 716; Lewis v. Duncan (Kan. 1903), 71 Pac. 577. And while this suit is in equity invoking equitable remedies, the statute of limitations governing relief on the grounds of fraud is applicable rather than laches, notwithstanding what we said in Blazer v. Black, 196 F. 2d 139, 147. See Dalton v. Lawrence Nat. Bank (Kan. 1950), 219 P. 2d 719; Guilfoyle v. Brown (Kan. 1939), 88 P. 2d 1082; Hughes v. Reed (10 Cir.), 46 F. 2d 435; Curtis v. Connly, 257 U.S.

260, 66 L. Ed. 222, 42 S. Ct. 100; Anno., 174 A.L.R. 1217, 1226, Sec. 5; 34 Am. Jur., Lim. of Actions, § 59, page 55.

The record is conclusive that the appealing shareholders did not personally have knowledge of the perpetrated fraud and equally convincing that the individual appellants cannot be charged with having failed to use due diligence to discover such fraud. In determining whether reasonable diligence was exercised for the purpose of discovering fraud, one of the most important determinants is the relationship of the parties. As we have seen, the record conclusively establishes a fiducial relationship between Black and the appellants as former stockholders. And the law does not require one to suspect his fiduciary. Surely no one would contend that the Kansas statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust and confidence. Indeed, some courts excuse the failure to use diligence in the face of a relationship of trust and confidence rendering it the duty of the party committing the fraud to disclose the truth to the other. Auer v. Wm. Meyer Co. (Ill. 1944), 54 N.E. 2d 394. Cf. Michelsen v. Penney (2d Cir.), 135 F. 2d 409. In the language of the Kansas court, "A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made." Dalton v. Hill, 219 P. 2d 710, 716. And, "Only where a party defrauded would plainly have discovered the fraud except for his own inexcusable inattention, will he be charged with a discovery in advance of actual knowledge on his part." Connell v. Saco Oil Co., 223 P. 2d 1020, 1027. See also Dalton v. Lawrence Nat. Bank, supra.

The successful appealing shareholders are entitled to money judgments against Black equal to the values of their equitable stock holdings in Black-Marshall sold to N.C.R.A. in 1947, less sums already received for such interests.

To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares.

Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them.

The judgment of the trial court is REVERSED and the causes REMANDED with directions to proceed in accordance with the views herein expressed.

PHILLIPS, *Circuit Judge*, dissenting in part:

Plaintiffs below have appealed from a single judgment adverse to them, entered in three cases, which had been consolidated for trial.

On June 28, 1949, Amen commenced an action in the United States District Court for the District of Kansas, numbered 3495 on the docket of such court, against William H. Black and Dale G. Ives. There were other defendants whose presence as parties is no longer material.

The action was brought as a class action for the benefit of Amen and all other stockholders of the Black-Marshall Oil Company, an Illinois corporation, hereinafter called the B-M Company, similarly situated. Certain former stockholders in the B-M Company intervened. In an amended complaint it was alleged that Black and Ives entered into a conspiracy to acquire the stock and assets of the B-M Company for Black's own use and benefit; that Black and Ives falsely represented to the plaintiffs that a sale of a large portion of the assets of the B-M Company had been arranged for an amount equal to $11 per share; that certain undeveloped oil and gas leases of the B-M Company would not be included in the sale, but would be retained for the benefit of the stockholders of the B-M Company; that induced by such false representations the plaintiffs, in 1944 and 1945, endorsed in blank and delivered to Black and Ives stock certificates representing their respective shares in the B-M Company and received therefor $11 per share; that Black and Ives effected a sale of the

stock and assets of the B-M Company to the National Cooperative Refinery Association, hereinafter referred to as the Cooperative Association, at a price, which, when prorated among the shareholders of the B-M Company, excluding the plaintiffs, resulted in a distributive portion per share substantially in excess of the price paid by Black and Marshall to the plaintiffs for their shares. The plaintiffs did not learn of such fraudulent conspiracy and acts until May, 1949. The plaintiffs prayed for the recovery of their proper and lawful distributive shares of the purchase price paid by the Cooperative Association for stock in the B-M Company.

It was further alleged in the amended complaint that Black caused to be issued to himself for his benefit, at the time of the original issue of the stock of the B-M Company, shares of stock for which Black gave no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for his own use and benefit and employed B-M Company funds to finance his personal business ventures. For the alleged wrongs to the corporation, Amen and the interveners prayed for relief on behalf of the corporation.

On September 25, 1950, Walker and Windish, co-receivers of the B-M Company, filed a complaint in intervention in No. 3495 in which they alleged that Black, at the time of the original issue of stock in the B-M Company, caused to be issued and transferred to him shares in the B-M Company for which he paid no consideration, and that Black withdrew large sums of money from the treasury of the B-M Company for purposes other than proper corporate purposes and for his own use and benefit and to finance his personal business ventures for his personal profit. The co-receivers prayed for relief on behalf of the corporation.

On July 14, 1950, the co-receivers filed an action in the United States District Court for the District of Kansas, numbered W-143 on the docket of such court, against William H. Black in which they alleged substantially the same facts as they had alleged in the intervening petition in No. 3495, and sought redress from the defendant on account of the stock alleged to have been issued to Black without consideration and the use of funds of the B-M Company by Black for his personal benefit.

Prior to July 15, 1949, Amen, Wadleigh, Danford, Robinson, Hall and Riley commenced an action in the District

Court of McPherson County, Kansas, against William H. Black and other defendants, whose presence as parties is no longer material. The action was brought for the benefit of the plaintiffs and all other stockholders of the B-M Company similarly situated. On the date last mentioned, such action was removed by the defendant to the United States District Court for the District of Kansas, where it was numbered 3509 on the docket of that court. On July 25, 1950, an amended complaint was filed in No. 3509, which alleged essentially the same facts as those alleged in the amended complaint in No. 3495.

Thus, it will be seen that in No. 3495 and No. 3509 certain former stockholders in the B-M Company, either as parties plaintiff or as interveners, sought relief in their individual behalf from William H. Black on account of the alleged fraudulent representations that a sale of the assets of the B-M Company had been effected, whereby they were induced to deliver their stock endorsed in blank to William H. Black, who subsequently sold such stock to the Cooperative Association at a much larger price per share. They, in effect, affirmed the sale of their stock to Black and prayed that Black be required to account for the moneys he received from the sale of the stock of plaintiffs and interveners to the Cooperative Association. It will be further observed that the plaintiffs and interveners in No. 3495 and No. 3509 undertook to join with their original action a stockholders' derivative action in which they sought to recover on behalf of the B-M Company for the injuries to the B-M Company alleged to have resulted from the issue of stock to Black without consideration and the alleged use by Black of the corporate funds for his personal benefit.

At the close of plaintiffs' evidence in the trial below, the co-receivers who had intervened in No. 3495 elected to stand upon their action No. W-143 for redress of the alleged wrongs to the B-M Company.

Many of the individual plaintiffs and interveners in No. 3495 and No. 3509 resided in, or in the vicinity of Aledo, Illinois, and may be referred to as the Aledo Group.

Involved in the consolidated actions were four claims:

1. The claim of the Aledo Group against William H. Black predicated on the alleged false representations of Black, acting through his agent, Ives, to recover the amount that Black received from the sale of the stock of the Aledo Group to the Cooperative Association in excess of

the $10 and $12 per share, respectively, which the Aledo Group received from their stock;

2. The claim in the nature of a derivative action by the original stockholders and an original action by the co-receivers to recover on behalf of the corporation on account of 32,457.5 shares of stock alleged to have been issued to Black without consideration and sold by him in 1947 to the Cooperative Association for $51.06 a share;

3. A claim asserted by the co-receivers for recovery of profits alleged to have been realized by Black from the use of B-M Company funds in personal business ventures; and

4. The claim of the co-receivers for profits realized by William H. Black for transactions in which B-M Company funds were used for Black's personal profit.

That Ives made the alleged false representations with respect to the sale of the assets of the B-M Company to members of the Aledo Group is conceded. The trial court found that such representations were made by Ives without solicitation by William H. Black and without the knowledge of William H. Black. However, Black testified that he told the Aledo Group that Ives was his agent in all matters with respect to the B-M Company, and especially for the purpose of furnishing information to the Aledo Group. Therefore, it is my opinion that Black was estopped to deny Ives' agency and that Ives had apparent or ostensible authority to furnish information on Black's behalf to the Aledo Group with respect to the B-M Company and that the representations made by Ives to the Aledo Group were within the scope of the apparent or ostensible authority of Ives and Black was bound thereby.[1]

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[1] Faber-Musser Co. v. William E. Dee Clay Mfg. Co., 291 Ill. 240, 126 N.E. 186;

2 CJS, Agency, § 96, pp. 1205-1220;

See also:

Anheuser-Busch v. Grovier-Starr Produce Co., 10 Cir., 128 F. 2d 146;

Greep v. Burns, 160 Kan. 48, 158 P. 2d 803;

Siedhoff v. Campbell, 141 Kan. 255, 40 P. 2d 404;

Nelson Development Co. v. Ohio Oil Co., 45 F. Supp. 933;

Spann v. Commercial Standard Ins. Co. of Dallas, Texas, 8 Cir., 82 F. 2d 593;

Metropolitan Life Ins. Co. v. Henderson, 9 Cir., 92 F. 2d 891;

On that ground and that ground alone, I concur in the majority opinion, insofar as it reversed the judgment below, with respect to the claim of the Aledo Group to recover from William H. Black for the injuries suffered by the Aledo Group on account of the alleged false and fraudulent representations of Ives.

The majority opinion affirms the judgment below, with respect to the third and fourth claims. It also affirms the judgment below, with respect to the derivative stockholders' action (Claim Two) and the claims asserted by the co-receivers in cause No. W-143. However, on a theory which, in my opinion, has neither basis in law nor justification in equity, the majority opinion holds that the Aledo Group may obtain redress against William H. Black for the wrong alleged to have resulted to the corporation from the issuance to William H. Black of the 32,457.5 shares of stock.

The Petroleum Investment Company was a partnership or a joint venture, formed in 1938. Its members were Black, Ives and the members of the Aledo Group. From $21,000 invested in the venture by members of the Aledo Group, nine dry holes were drilled in Illinois and Indiana. That unsuccessful venture was completed in early 1939. Thereafter, in the spring of 1939, William H. Black and D. J. Marshall formed a partnership, which thereafter acquired five oil and gas leases in Kansas. That partnership drilled a well on a lease known as the Esfeld lease, which came in as a producer in July, 1939, and established such lease as one of the most valuable leases in the State of Kansas. The funds for acquiring the lease and drilling and equipping such well were furnished by Black and Marshall, with the exception of $9,000, which Black borrowed on his own credit and which was ultimately assumed by the B-M Company.

Up to August 23, 1939, the Aledo Group made no advancements of funds to the Black-Marshall partnership. After the Esfeld lease had been developed as a commercial producer and from August 23, 1939, to December 7, 1939, the Aledo Group advanced to the partnership $17,650 and Black advanced $28,415. Subsequent to the latter date, the Aledo Group advanced additional funds, both before and

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Ferro Concrete Const. Co. v. United States, 1 Cir., 112 F. 2d 488, certiorari denied 311 U.S. 697, 61 S. Ct. 136, 85 L. Ed. 452; Roth v. Hyer, 5 Cir., 133 F. 2d certiorari denied 318 U.S. 782, 63 S. Ct. 859, 87 L. Ed. 1149.

after the incorporation of the B-M Company, to carry on the development of the Kansas leases.

The first meeting of the incorporators of the B-M Company was held in Aledo, Illinois on January 11, 1940. The minutes of that meeting recite that the chairman presented a subscription agreement bearing subscriptions for 122,500 shares of common stock and 9,055 shares of preferred stock of the B-M Company and that a resolution was unanimously passed accepting such subscriptions on behalf of the corporation. At the same meeting a proposal was presented from the Landowners Oil Association, owned by a Chicago, Illinois group, to exchange at least 75 per cent of the outstanding stock of Landowners for 20,000 shares of common stock and 2,000 shares of preferred stock of the B-M Company and that a resolution was adopted approving such proposal.

The five Kansas leases were assigned to the B-M Company in exchange for the entire subscription of 122,500 shares of common stock and 9,055 shares of preferred stock. Undoubtedly, it was originally contemplated that 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Black and 10,000 shares of common stock and 1,000 shares of preferred stock would be issued to Marshall, but it developed that Black and Marshall were unwilling to assign the leases to the B-M Company, unless they received, in addition to the 20,000 shares of common stock and 2,000 shares of preferred stock, 64,870 shares of common stock.

Black signed the stock certificates in blank. The certificates for 64,870 shares made out to Black, et al. (The omission of Marshall's name was for reasons personal to Marshall) were not signed by Ives and not actually delivered to Black and thereafter Ives reissued such stock to Black and Marshall at about the time of the stockholders' meeting January 1, 1941, to enable Black to transfer to members of the Aledo Group a portion of such shares, which they had purchased from Black. While Black admitted he could not explain why Ives failed to sign the original certificates made out to Black, et al., his testimony made it very clear that Black and Marshall were unwilling to assign the Kansas leases for 20,000 shares of common stock and 2,000 shares of preferred stock.

Common stock was issued to the investors in the Petroleum Investment Company on the basis of one share of common for each $2.00 invested, and one share of preferred for each $4.00 invested, both in the Illinois venture and by

advancements to the Black-Marshall partnership in Kansas.

Certainly, Marshall was under no obligation, legal or moral, to bail the Aledo Group out from their non-profitable venture in Illinois. No wrongdoing by Black with respect to the Illinois venture was claimed, and it follows that Black was under no legal or moral duty to aid the Aledo Group in recouping their losses in the Illinois venture. Under all the facts and circumstances, it is a reasonable inference that Black and Marshall would be unwilling to assign the Kansas leases in exchange for 20,000 shares of common stock and 2,000 shares of preferred stock.

The original five directors of B-M Company were Black, Marshall and three members of the Aledo Group; Ives, Boyd and Stevenson. At the second annual meeting of the stockholders of the B-M Company, held in January, 1941, Black and Marshall and five members of the Aledo Group; Ives, Stevenson, Berglund, L. E. Robinson and Sherrard were elected as directors of the B-M Company. At the annual meeting of the directors, held on January 7, 1941, an audit report covering the first fiscal year, ending July 31, 1940, was examined and approved. Such audit report showed that on January 20, 1940, the Board of Directors authorized the issuance of 122,500 shares of common stock, including the 64,870 shares of stock issued to Black and Marshall in exchange for five leases and the assumption by the corporation of liability existing against the said leases in the amount of $8,827.93. At the next annual meeting of the board of directors, held in 1942, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Goup and Allen James of the Landowners Corporation, an audit report for the period ending July 31, 1941, was examined and approved. That audit report also showed the issuance of the above-mentioned shares. At the next annual meeting of the board of directors, held in January, 1943, when the directors were Black and Marshall and Ives, Berglund and Sherrard of the Aledo Goup and Ranney of the Landowners Corporation, an audit report for the year ending July 31, 1942, was examined and approved. The report also showed the issuance of the above-mentioned stock. Like audit reports covering subsequent years were presented, examined and approved at stockholders' meetings, held in January and December, 1944.

The minutes of the annual meeting of the stockholders

of the B-M Company, held on January 20, 1942, which were read and approved at the annual stockholders' meeting in 1943, showed Black as the owner of 70,000 shares of B-M Company common stock. The same is true with respect to the minutes of the stockholders' meeting held on January 27, 1943, which were read and approved at the stockholders' meeting in January, 1944.

At the annual meeting of the stockholders, held on December 6, 1944, the stockholders adopted a resolution authorizing the purchase from Marshall of 38,978.75 shares held by him and on the same day the board of directors adopted a like resolution and a written contract was entered into for the purchase of such shares from Marshall.

Finally, many of the audit reports referred to above were furnished to a number of persons who were members of the Aledo Group.

The trial court found that Black and Marshall were issued 20,000 shares of common stock, 2,000 shares of preferred stock, and an additional 64,870 shares of common stock in exchange for the Kansas leases and that the corporate records reflected these facts.

That the corporate records reflected such facts was established by uncontroverted written evidence. That such stock was issued to Black and Marshall in exchange for an assignment of the Kansas leases was unequivocally testified to by Black.

Since the trial judge has the opportunity of observing a witness while testifying and his demeanor on the witness stand, ordinarily the questions of the credibility of the witness and the weight to be given his testimony are peculiarly questions for determination by the trial court.[2]

Under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court may not set aside findings of fact by a trial court, unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge the credibility of witnesses. When there is evidence to support a finding, the reviewing court may not set it aside as clearly erroneous, unless, on a consideration of the

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[2] Zimmer v. Acheson, 10 Cir., 191 F. 2d 209, 212;
Brown v. American National Bank, 10 Cir., 197 F. 2d 911, 914.

entire record, the reviewing court is left with the definite and firm conviction that a mistake has been committed.[3]

Under the existing facts and circumstances, it would have been strange, indeed, if Black and Marshall would have been willing to have transferred to the B-M Company the Esfeld lease, the large value of which already had been established by development, and the other four leases, which gave much promise, for 20,000 shares of common stock and 2,000 shares of preferred stock in the B-M Company.

I think it may not be said that this court, on a consideration of the entire evidence, is left with the definite and firm conviction that the finding of the trial court, last above adverted to, was clearly erroneous.

I will now assume, without conceding, that the 32,457.5 shares, one-half of the 64,870 shares issued to Black and Marshall, were issued to Black without consideration. If that occurred, the wrong was a wrong to the B-M Company, the corporation, and not a wrong to its stockholders, although they might suffer indirectly because thereof. It gave rise to a claim which only the corporation could assert, or the stockholders in a proper case as a derivative action. In legal effect a derivative action by a stockholder or stockholders is one conducted by a stockholder or stockholders as the corporation's representative.[4]

The stockholder is only a nominal plaintiff. The corporation is the real party in interest.[5]

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[3] United States v. United States Gypsum Co., 333 U.S. 364, 395;

H. F. Wilcox Oil & Gas Co. v. Diffie, 10 Cir., 186 F. 2d 683, 696.

[4] Eriksson v. Boyum, 150 Minn. 192, 184 N.W. 961, 963;
Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516.
Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5939.

[5] Thomson v. Mortgage Inv. Co., 99 Cal. App. 205, 278 P. 468, 471;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Hayden v. Perfection Cooler Co., 227 Mass. 589, 116 N.E. 871, 872;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5939.

Where the plaintiff does not seek to enforce relief for the benefit of the corporation, it is not derivative.[6]

Unless otherwise provided by statute, a stockholders' derivative action is always one in equity.[7]

In a derivative action the stockholder stands in the corporation's shoes and must base his action on the corporation's rights and a wrong to it.[8]

A stockholder cannot sue unless there is, at the time he brings the suit, a cause of action which could be instituted by the corporation if it so desired.[9]

The relief granted will be exactly the same as the corporation might have had if it had been plaintiff.[10]

Any recovery belongs to the corporation. Direct relief to the stockholders cannot properly be granted.[11]

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[6] Spear v. H. V. Greene Co., 246 Mass. 259, 140 N.E. 795, 798;

Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 252, 263;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, Sections 5939, 5908.

[7] Moore v. Las Lugas Gold Mines, 172 Wash. 570, 21 P. 2d 253, 263;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5944.

[8] Lawrence v. Southern Pac. Co., 180 F. 822, 825;

Turner v. Markham, 155 Cal. 562, 102 P. 272, 275;

Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;

Walters v. Horace Waters & Co., 201 N.Y. 184, 94 N.E. 602, 604;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5947.

[9] Kessler v. Ensley Co., 123 F. 546, 550, c.d. 205 U.S. 541;

Smith v. Lewis, 211 Cal. 294, 295 P. 37, 39;

Seitz v. Michel, 148 Minn. 80, 181 N.W. 102, 105;

Cochran v. Shetler, 286 Pa. 226, 133 A. 232, 234;

Outing v. Plum, 212 Iowa 1169, 235 N.W. 559, 560;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5947.

[10] Collins v. Penn-Wyoming Copper Co., 203 F. 726, 729;

Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513, 516;

Reid v. Robinson, 64 Cal. App. 46, 220 P. 676, 680;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 6027.

[11] Jacobs v. First Nat. Bank of Shreveport, 35 F. 2d 227, c.d. 284 U.S. 634;

Joyce v. Congdon, 114 Wash. 239, 195 P. 29, 30;

Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;

Any defense, affirmative, or for want of facts, that would be good if the corporation itself was plaintiff is also good in a stockholders' derivative action.[12]

A judgment against the corporation in an action brought by it involving the same subject matter ordinarily is a defense to a derivative action.[13]

The majority holds that the Aledo Group could not maintain the derivative action and that the co-receivers could not maintain a direct action for the benefit of the corporation on account of the alleged issue to Black of the 32,457.5 shares of stock for reasons set forth in the majority opinion.

The action by the co-receivers, cause No. W-143, was commenced more than six years after the directors and certainly many of the stockholders had full knowledge of the fact that 64,870 shares of stock in the B-M Company had been issued to Black and Marshall, purportedly in exchange for transfer of the Kansas leases.

Section 60-306, G.S. Kan. Anno. 1949, in part provides:

> "*Third.* Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Even if it can be said to be an action for fraud, the suit must have been commenced within two years after the discovery of such facts as could on reasonably diligent inquiry or investigation lead to the knowledge of the fraud.[14]

Harris v. Pearsall, 116 Misc. Rep. 366, 190 N.Y.S. 61, 75; Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 6028.

[12] Kessler v. Ensley Land Co., 148 F. 1019, 1020, c.d. 205 U.S. 541;

Fletcher Cyclopedia Corporations, Perm. Ed., Vol. 13, § 5859.

[13] Hawkins v. Glenn, 131 U.S. 319, 329.

[14] See City of Coffeyville v. Metcalf, 134 Kan. 361, 5 P. 2d 807, 810;

Woodworth v. Kendall, 172 Kan. 332, 239 P. 2d 924, 926.

It seems clear to me that the corporate action was barred by the Kansas statute of limitations. Likewise, it is clear that on June 28, 1949, when the derivative action was commenced, an action brought by the corporation would likewise have been barred by the Kansas statute of limitations.

Under facts clearly established in the evidence, it certainly is beyond the realm of possibility that the Aledo Group, as stockholders, and a portion of them as directors, did not know, at least more than four years from the time the first of the actions was commenced, all of the facts with respect to the issuance of the 64,870 shares of stock to Black and Marshall.

Applying the statute of limitations by analogy, the derivative action was clearly barred by laches.

If the 32,457.5 shares of stock were wrongfully issued to Black, a like amount of the stock was wrongfully issued to Marshall, yet the Aledo Group, in 1944, not only knew of the issuance of such stock to Marshall, but they joined as stockholders and a portion of them as directors in the adoption of resolutions which ultimately resulted in the purchase of such stock from Marshall, thus acquiescing in the original issue of stock to Black and Marshall.

The majority, conceding that neither the corporate action nor the derivative action may be maintained, hold that certain persons who compose only a portion of the stockholders at the time of the alleged wrongful issue of such stock to Black, but who are no longer stockholders in the corporation, may recover the indirect or consequential damages suffered by them on account of the wrongful issue of such stock. They thus permit recovery by a limited group of former stockholders for a wrong done to the corporation, which resulted not only in indirect injury to such former stockholders, but to other stockholders, such as the Landowners Association and their successors.

If the 32,457.5 shares of stock issued to Black were, in fact, issued without consideration in 1940, the wrong was a primary wrong to the corporation, which resulted in indirect injury to all of the stockholders of the B-M Company at that time.

Since the wrong complained of was a wrong to the corporation, resulting in immediate and direct injury to it and only indirect or consequential damage to all of

the stockholders, a stockholder or stockholders could not maintain an individual action to recover damages for such wrong.[15]

A stockholder cannot maintain an action in his own name and in his own behalf to recover loss resulting from depreciation of the value of his stock caused by an injury to the corporation itself.[16]

It is only when the injury to the shares of the stockholder is peculiar to him alone and does not fall alike upon other stockholders that he can recover as an individual.[17]

The theory upon which such relief is given by the majority opinion to the Aledo Group is contrary to the theory of recovery for such alleged wrong set forth in the pleadings and to the theory upon which the case was presented, both in the trial court and in this court.

For the reasons indicated, I respectfully dissent from that portion of the opinion which directs the granting of relief to the Aledo Group, because of the issuance of the 32,457.5 shares of stock to Black.

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[15] Seitz v. Michel, 148 Minn. 80, 181 N.W. 102, 105;
Wells v. Dane, 101 Me. 67, 63 A. 324, 325, 326;
Niles v. New York Cent. & H.R.R. Co., 176 N.Y. 119, 68 N.E. 142, 144;
White v. British Type Investors, 130 N.J. Eq. 157, 21 A. 2d 681, 683.

[16] Green v. Victor Talking Mach. Co., 24 F. 2d 378, 380, c.d. 278 U.S. 602;
Stinnett v. Paramount-Famous Lasky Corp., 37 S.W. 2d 145, 149;
Bartlett v. New York, N.H. & H.R.R. Co., 221 Mass. 530, 109 N.E. 452, 453;
Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. 2d 976, 980;
Niles v. New York Cent. & H.R.R. Co., 176 N.Y. 119, 68 N.E. 142, 144;
Baillie v. Columbia Gold Mining Co., 86 Ore. 1, 166 P. 965, 969;
18 CJS, Corporations, § 559, p. 1272.

[17] Oliphant v. Woodburg Coal & Mining Co., 63 Iowa 332, 19 N.W. 212, 214, 215;
Dudley v. Armenia Ins. Co., 115 App. Div. 380, 100 N.Y.S. 818, 820.

JUDGMENT

Eighteenth Day, March Term, Friday, May 4th, 1956.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Alfred P. Murrah, Circuit Judge, and Honorable W. R. Wallace, District Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in these causes be and the same is hereby reversed, that these causes be and the same are hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that appellants have and recover of and from appellees their costs herein and have execution therefor.

(802-9)

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Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM H. BLACK and RUTH F. BLACK, *Petitioners*,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by Lois L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; Co-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 346

WILLIAM H. BLACK and RUTH F. BLACK, *Petitioners,*

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH; CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents' Brief in Opposition has brilliantly achieved a principal object of adversary proceedings—the production of a clear and precise issue. We do not refer to that half of the brief which wearily attempts to restate the findings of the District Court,

choosing to stand without further comment upon our own brief, which gave this Court the facts bearing on the issues presented. Argument on the substantive issues, as perceived by respondents, would hardly be appropriate at this stage. It is in the jurisdictional issue that respondents, confronted with unmistakable conflict of the decision below with the decisions of this Court and of the Court of Appeals for the Second Circuit, have been driven to the position of confession and avoidance. This is progress.

The present proceeding—says the Brief in Opposition—is not what the Petition claims it is. It is not, so say respondents, a "class" action described by Section 23(a)(3) of the Federal Rules where the causes of action are separate and independent, where the principle of res adjudicata does not apply to members of the class who do not intervene and where each intervener must establish the basis of federal jurisdiction. (Brief in Opp., pp. 21-28.) Rather, so they claim now, it has its face, and its status, lifted to that of a "hybrid" class action described in Section 23(a)(2), one involving the disposition of "interdependent" claims "against a fund held in constructive trust" (p. 25) and thus akin to a creditor's bill for the appointment of a receiver, where, once federal jurisdiction is established, interveners in ancillary proceedings need not establish diversity of citizenship or the jurisdictional amount. They find comfort and support in an alleged similarity to *Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875, in which the Court—unhappily for them—said, "we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund." (197 F. 2d at 979).

Now the difficulty with the defense called confession and avoidance is that if the avoidance fails to avoid, the confession bites deep. Nor is this the first confession. Before the Court of Appeals respondents described the proceeding in this way:

> "In the present cases, substantially the same representations were made by the same individual with respect to the same transaction and at approximately the same time. . . . *the inquiry is whether* [this case] *presents common questions of law or fact.* . . . All of the questions of law and fact regarding Black's liability are common questions. . . . The present cases, therefore, are clearly within the authority of Rule 23(a)(3)." (Appellants' Reply Brief, p. 4.) (Emphasis added.)*

And the Court of Appeals also described the proceeding as one where the claims were quite separate and distinct:

> "A preliminary question is whether the claims of the appellant stockholders may be maintained as a spurious action under Rule 23(a)(3) . . . The appellees challenge the propriety of the suit as such on the grounds that the claims being independent and based upon separate and distinct allegations of fraudulent representations, are not maintainable in one action.
>
> "The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged.

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* Respondents' suggestion that Rule 23(a)(3) also embraces hybrid-type actions (pp. 26-27) fails to hide their embarrassment in switching sub-categories of Rule 23 at this stage. In all suits under 23(a)(3) "there is no jural relationship between the members of the class . . . The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact." (3 Moore, Federal Practice 3443 (2d ed. 1948).)

> The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And *while their claims and demands were separate,* they alleged substantially the same facts and sought common relief. . . . this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted." (Pet. Appendix, pp. 51-52.) (Emphasis added.)

It is quite true, as respondents point out (p. 22), that petitioners did not discuss the *Dickinson* case. Other cases not in point also were not discussed. Any similarity between *Dickinson* and the case now before this Court is supplied purely by the ingenuity of respondents. That case was one of a class action under Rule 23(a)(2) where non-intervening members of the class, it was held, would be bound by the judgment and so need not prove diversity of citizenship in order to come in to preserve their rights. The stockholders sued not as such but as subscribers to a specific fund, known as the Rinke Agency Funds, established to aid the corporation in its financial difficulties. (197 F.2d at 975.)* The relevant Conclusion of Law reached by the trial court was:

> "IX. The claim of the interveners . . . in behalf of themselves and all other Rinke Agency subscribers . . . for the recovery of [specified sum and interest] fraudulently paid to Dickinson and Lloyd out of the Rinke Agency Funds . . . is sustained." (11 Fed. Rules Serv. 489, 490.)

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* Actually Burnham and Vaughan intervened (alleging and proving the necessary jurisdictional facts) asserting the hybrid class action in a suit brought by Dickinson against Rinke. After a judgment in their favor, members of the class represented by them were allowed to intervene, without jurisdictional averments, to obtain their portion of the fund already held to belong to such class.

The interdependent nature of the claims is readily seen from the Second Circuit opinion:

> "The district judge stated the formula of recovery which he applied thus: 'A final decree should be entered according to each intervener claimant . . . in an amount which shall bear *the same ratio* [to the misappropriated funds] as the amount of the intervener's claim bears to the total of the claims of the interveners allowed by the Court.
>
> * * *
>
> "Although none of the contributors has been paid in full, *no one*, and certainly not [Dickinson], *now asserts or suggests that they should have full recovery from him as on an ordinary tort liability for conspiracy and defrauding.* The court's power of disposition over the fund was therefore absolute and final." (197 F.2d at 978, 980.) (Emphasis added.)

The *Dickinson* opinion, rather than aiding respondents, only underlines the separateness of the instant claims. Here, plaintiffs are to be paid in full. Here, recovery *is based* on an ordinary tort liability for defrauding. Here, "the successful appealing shareholders" are said to be "entitled to money judgments against Black equal to the values of their equitable stockholdings in Black-Marshall sold to NCRA in 1947, less sums already received" (Pet. Appendix, p. 68), a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants.

Any notion that the *Dickinson* case authorizes alleged victims of a fraud or other wrongs simply to label the fruits of the wrong a "fund" in order to maintain a hybrid action was dispelled by the same court in a later opinion, *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F.2d 687 (2d Cir. 1954),

cert. denied, 349 U.S. 915. The complaint was brought on behalf of some 400 union members for damages sustained as a result of a conspiracy to bribe an officer of their international, but was dismissed *inter alia* for failure of any one member to show the requisite jurisdictional amount. Even the willingness to reduce the amount of aggregate damages to a sum equal to the amount of the bribe itself could not change the spurious nature of the class action:

> "By asserting 'unjust enrichment' in the amount of the bribe, reducing the ad damnum clause from $600,000 to $36,000, as 'at least' the amount of the aggregate damage, and calling this a 'fund' to which plaintiff [union] is entitled 'as trustee,' plaintiff has merely added verbiage. There is no fund. The claim remains one on behalf of 400 separate individuals for the damage suffered by each due to the alleged tortious conduct of defendant. . . .
>
> * * *
>
> ". . ., what is plainly a series of separate and distinct claims cannot be transmuted into 'a single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone and casting the prayer for relief in the form of a declaratory judgment proceeding affecting the disposition of a so-called 'fund'." (217 F.2d at 695.)

Petitioners need not dwell long on respondents' assertion that "by the express provision of Rule 82, whether a class suit is 'true,' 'hybrid' or 'spurious' under Rule 23(a) cannot change the jurisdictional requirement for intervention." (p. 27.) Rule 82 can speak for itself. It states in full:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

This, of course, is petitioners' whole point. The permissive joinder device of Rule 23(a)(3) cannot be utilized to extend federal jurisdiction. Trial convenience may warrant the disposal in a single spurious class action of questions ordinarily resolved in separate suits, but it cannot override the familiar jurisdictional rules for the joinder of multiple parties.

In sum, the Brief in Opposition brings into sharp focus the issue on this jurisdictional point. Which is the correct statement of the legal characteristics and consequences of this proceeding, upon which rests the necessity for each intervener to show diversity of citizenship—that of the petitioners, with which both the respondents in the court below and that court agreed, or the new and revised statement of respondents which here attempts to change the basic nature of the case?

The Brief also points to an additional reason for this Court to review the decision below.

It not only, in essence, concedes, indeed highlights, the conflict between this decision and those of the Second Circuit and this Court, but brings out the importance of resolving it. For only by continuous and specific insistence on the part of this Court will the lower courts be spurred to that strict analysis of proceedings before them upon which rests the mainte-

nance of the constitutional limitations upon federal jurisdiction.

Respectfully submitted,

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No. 13

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Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM H. BLACK and RUTH F. BLACK,

Petitioners,

v.

A. M. AMEN; H. C. WADLEIGH; ELEEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN, WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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AUGUST, 1957

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The District Court's findings of fact, conclusions of law, and judgment (R. 118) are not reported. The opinion of the Court of Appeals for the Tenth Circuit entered November 25, 1955 (R. 409, dissenting opinion

at R. 436), and withdrawn May 4, 1956 (R. 439), is not reported. The new opinion of the Court of Appeals (R. 441, dissenting opinion at R. 460) is reported at 234 F. 2d 12.

JURISDICTION

On May 4, 1956, the Court of Appeals vacated its judgment of November 25, 1955 (R. 439) and entered a new judgment (R. 474). A petition for rehearing, filed May 24, 1956, was denied June 19, 1956 (R. 474). The petition for a writ of certiorari was filed on August 23, 1956, and, limited to the question set forth below, was granted on November 5, 1956.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented is whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervenor or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship.

CONSTITUTIONAL PROVISION, STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Article III, Section 2 of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, . . . between Citizens of different States; . . . ."

The United States Code (62 Stat. 930, 28 U.S.C. § 1332) provides in pertinent part:

"§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States:"

Rule 23(a) of the Federal Rules of Civil Procedure provides:

"Rule 23. *Class Actions.*

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 82 of the Federal Rules of Civil Procedure provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

STATEMENT

The jurisdictional issue presented for this Court's determination arises in connection with three actions consolidated below for trial and appeal. All alleged in essence that the petitioner,[1] Black, was engaged in a conspiracy to defraud stockholders of Black-Marshall Oil Company. The three actions, all based on diversity of citizenship, were (1) an action brought in the Federal District Court in Kansas by a former stockholder on behalf of all Black-Marshall stockholders; (2) a comparable action brought in the Kansas state court by the same former stockholder and five other former stockholders and later removed to the Federal District Court; and (3) an action brought in the Federal Dis-

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[1] Throughout this brief "petitioner" refers to William H. Black, who is the only petitioner whose actions are presently involved in the case, and is the only petitioner against whom the court below said respondents would be entitled to judgment (R. 460).

Petitioner prevailed below as to one appellant, McBride, on the individual causes advanced (R. 453) and as to the co-receivers on all corporate causes (R. 455). McBride and the co-receivers are listed as respondents solely because the judgment of the Court of Appeals (R. 474) reverses the trial court without setting forth separately the portions of the litigation in which petitioner prevailed. Therefore, in this brief "respondents" refers to the individuals who prevailed in the court below.

By order of April 22, 1957, this Court entered an order granting the motion to substitute Hays Hall as executor of the will of Edith Hall in the place and stead of Edith Hall, one of the respondents.

trict Court in Kansas by co-receivers for Black-Marshall.

Two distinct types of causes of action were involved in these cases—the first asserted individual wrongs to named persons, and the second alleged corporate wrongs to Black-Marshall Oil Company.

The fraud alleged by the individual plaintiffs, former stockholders of the Oil Company, was that in 1944 and 1945 Black and a co-conspirator, Ives, through fraudulent representations, induced the shareholders to sell their Black-Marshall stock to Black at $10 and $12 a share while at the same time having an assured resale at a higher price, and that he did, indeed, sell the stock later at this higher price to National Cooperative Refinery Association. The second claim of fraud, asserted on behalf of the company both by the individual plaintiffs and by the co-receivers, charged Black with having had issued to himself some 32,000 shares of the company's stock for no consideration, which he also sold to the Refinery Association.

Amen, the original single plaintiff in the Federal District Court for Kansas, was a citizen of South Dakota and so alleged. He was thus in a position to establish diversity of citizenship with Black-Marshall Oil Company, an Illinois corporation (the defendant which led the list both in the caption and the body of the complaint and was apparently regarded as a necessary party), with defendants Black and Ives, citizens of California and Illinois respectively, and with National Cooperative Refinery Association, a citizen of Kansas, apparently also considered an important party since Amen alleged that his shares were fraudulently

purchased with "monies furnished by the Association for such purposes, and with the full knowledge and assistance of the Association" (R. 4). So Amen, out of a host of stockholders who became intervenors—most, if not all of whom, were citizens of the same state as one or more of the defendants—brought the suit, although he had had no dealings with Black, Ives, or the Oil Company. His stock was purchased through a man named Danford, apparently an Illinoisan, who, like other plaintiffs, later intervened without stating his citizenship (R. 21, 453).[2]

With a foothold established by a single plaintiff in the federal court, an action was also brought in the state court in Kansas. Here Amen was joined as plaintiff by five citizens of Illinois, of which the defendant Oil Company was a citizen. Upon petition of certain defendants, including Black but also including residents and citizens of Kansas (R. 38-39), this action was removed on July 15, 1949 to the federal court, a palpable error, since citizens of Kansas had been properly joined as defendants and served.[3]

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[2] Actually, Amen had no standing to sue on the corporate cause involving the issuance of the 32,000 shares to Black. Amen purchased his shares in July 1941 after the shares complained of were issued to Black and thus did not meet the requirement of Federal Rule of Civil Procedure 23(b) that the plaintiff be "a shareholder at the time of the transaction of which he complains." Henis v. Compania Agricola de Guatemala, 210 F. 2d 950 (3rd Cir. 1954); Weinhaus v. Gale, 237 F. 2d 197, 199 (7th Cir. 1956).

[3] ". . . Any other action [*i.e.*, not founded on the laws of the United States] shall be removed only if none of the parties in interest joined and served as defendants is a citizen of such state in which such action is brought." 28 U.S.C. § 1441(b).

The removal was also in error in that the proceeding involved both parties defendant and plaintiff who were Illinois citizens.

Amen also moved in the Federal District Court for the Southern District of Illinois to set aside the dissolution of the Oil Company, effected under Illinois law on June 30, 1947 (R. 379). The Illinois District Court set aside the dissolution and appointed D. Arthur Walker of Kansas and Fred E. Windish of Illinois as co-receivers for Black-Marshall, who then instituted a proceeding in the Federal District Court in Kansas against the same defendants on behalf of the corporation (R. 370).

On July 25, 1950, with both actions now in the Federal District Court in Kansas and co-receivers (whose own complaint made a third suit) appointed, many of the other respondents, without alleging any jurisdictional qualifications, petitioned to intervene in both cases. Motions were also made for leave to file amended complaints and apparently to dismiss all defendants except Black, the Oil Company, and Landowners Oil Association.[4] On September 22, 1950, the co-receivers also moved for leave to intervene as parties-plaintiff in the original federal court case and to dismiss the Oil Company as a defendant.

Five of the plaintiffs were Illinois citizens, defendant Black-Marshall was an Illinois corporation and defendants Ives and Sherrard were also Illinois citizens. In this regard, the petition for removal had stated that the defendants who were Illinois citizens had not been served and that there was therefore diversity of citizenship between plaintiffs and defendants upon whom service had been obtained (R. 38-39). This failure to serve the non-diverse defendants, however, could not justify removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 541.

[4] Landowners Oil Association is a Delaware corporation which, at the time of the organization of Black-Marshall Oil Company, exchanged shares of its capital stock for Black-Marshall shares (R. 123).

On September 25, 1950, the District Court, without apparent consideration of jurisdictional requirements, entered a series of orders which (as best as can be determined from the entire record certified to this Court) granted all the applications for intervention, granted the applications to file amended complaints, and the motions to dismiss various defendants, apparently including the motion of the co-receivers to dismiss the Oil Company.

The simple fact is that at no point was attention paid to the citizenship of the intervenors, the presence of parties necessary for the relief sought, or the alignment of parties.

It was in this posture that the receivers' case was brought to trial and, during the trial, the two actions by the former stockholders consolidated with it (R. 153-156). Plaintiffs were allowed to present both the individual and corporate causes of action, although none of the more than 30 plaintiffs—with the single exception of Amen—had satisfied the jurisdictional requisites for being in the federal court. None of the intervenors alleged their citizenship, and only a few their residence (R. 21, 30, 31, 48, 53, 54). They made no request for findings of fact regarding their citizenship and the trial court made none (R. 96, 118-119).[5]

After a month-long trial, without a jury, Judge Hill dismissed all three actions and entered judgment for the defendants. The court's findings, fully documented to the record, were that the evidence did not establish

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[5] The only finding requested by plaintiffs with respect to citizenship was that the original plaintiff, Amen, was a resident and citizen of South Dakota (R. 96).

any conspiracy by Black with anyone, or any fraudulent misrepresentations by Black, or that Ives who did make them was Black's agent. On the contrary, the court found that plaintiffs received full value for their shares, and that their subsequent increase in value resulted from a successful drilling program and increase in the price of oil. Finally, it found that the shares received by Black from the corporation, including the 32,000 shares under attack, were consideration for transfer to the company of his interest in valuable oil leases.

On appeal the judgment was reversed in an opinion filed May 4, 1956 (replacing one by the same court filed on November 25, 1955). The jurisdictional question was brushed aside with the statement that the court's jurisdiction was not impaired by the interventions, irrespective of the citizenship or amount claimed (R. 442). A majority of the court went on to hold, notwithstanding the trial judge's findings and conclusions, that Black concocted a scheme to defraud, knew of Ives' misrepresentations, and was a constructive trustee holding the proceeds of the 1947 sale of his own stock in trust for the former shareholders.[6]

With respect to the corporate causes, the majority held that such claims must fail for lack of standing to maintain the suit (R. 455). Nonetheless, the majority, again in the face of the findings of the District Court, held ("on a theory which," according to Chief

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[6] Chief Judge Phillips concurred in that part of the decision holding petitioner liable to the individual respondents solely on the ground that Ives was petitioner's agent and petitioner was therefore legally responsible for Ives' misrepresentations (R. 464).

Judge Phillips, "has neither basis in law nor justification in equity" (R. 465)) that the 32,000 shares were fraudulently issued to Black and that despite the failure of the corporate claims, the former stockholders were entitled to redress against Black for the wrong which it held had been done to the corporation.

SUMMARY OF ARGUMENT

I

This litigation involves a number of separate and distinct claims, advanced by over 30 intervening plaintiffs, in which the sole basis for federal jurisdiction is diversity of citizenship. The Court of Appeals held that since common questions of law or fact were involved and common relief sought, the federal district court had jurisdiction under Federal Rule of Civil Procedure 23(a)(3) to decide all of these claims, irrespective of the citizenship of the intervenors or the amount claimed, simply because the one plaintiff who originally brought suit had satisfied federal jurisdictional requirements.

The plain result was to bring for decision into the federal courts a sizeable number of distinct, individual claims without regard to jurisdictional standards required under the Constitution and the acts of Congress. As early as *Strawbridge* v. *Curtiss*, 3 Cranch 267, it was authoritatively declared that in diversity cases involving multiple parties complete diversity of citizenship must exist between all parties, with each individually meeting federal jurisdictional requirements. The Court of Appeals, in dispensing with jurisdictional

requirements for intervenors, has swept aside the established law of a century and a half.

No basis can be shown for invoking Rule 23(a)(3) to contravene the established jurisdictional limitations on the federal courts. Rule 23(a)(3) provides a permissive joinder device useful in cases where a number of individuals have separate claims or interests which might involve common questions of law or fact. Suits under this Rule accordingly differ from class actions under Rule 23(a)(1), which involve a common or joint right or interest, and Rule 23(a)(2), which concern interests in a definite property within the jurisdiction of the court. Because Rule 23(a)(3) is nothing more than a means of permissive joinder, parties relying on it must still satisfy federal jurisdictional requirements applicable to the usual diversity suit in which many parties are joined. This was stated most clearly by the late Judge Jerome Frank, writing for himself and Judges Learned and Augustus Hand, in *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387, 388 (2nd Cir. 1947): "[A] proceeding under 23(a)(3) is, in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements."

The jurisdictional requirements in suits under Rule 23(a)(3) are thus identical to those for the usual suits involving the joinder of many parties. These requirements were fully considered in *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, which confirmed that each claimant must individually establish the basis for federal jurisdiction.

The Court of Appeals' disregard of jurisdictional

requirements stems from an interpretation of Rule 23(a)(3) advanced by Professor James Wm. Moore in his treatise on Federal Practice. Professor Moore himself recognizes that his view dispenses with accepted jurisdictional requirements for intervenors; this he would justify on the ground of supposed procedural utility. The vulnerability of Professor Moore's position has been recognized and, indeed, has been labelled as a use of Rule 23(a)(3) to accomplish a bald enlargement of federal jurisdiction.

As this Court has emphatically stated, problems of jurisdiction in a federal system cannot and should not be resolved in terms of procedural convenience or inconvenience. Diversity jurisdiction must be scrupulously confined, in recognition of the interests and responsibilities of the state courts and to avoid unnecessary burden and strain upon the federal judiciary. Claimed procedural utility cannot replace constitutional and statutory requirements.

Far from being justifiable as convenient or desirable, disregard of federal jurisdictional requirements is, in fact, a likely source of confusion and mischief. This is readily apparent from the present case, where failure to follow jurisdictional rules has resulted in procedural disorder and substantive error. Moreover, in litigation based on diversity of citizenship, where federal courts are obliged to determine and apply state law, disregard of jurisdictional requirements operates to deprive federal courts of authoritative determinations of state law by state tribunals. If parties who should be litigating in state courts are allowed to enter the federal courts improperly, state tribunals are denied

the opportunity to determine state law questions involved. Consequently, the likelihood arises that the federal courts will either misinterpret or overlook controlling state law. The present case graphically illustrates these dangers, for the Court of Appeals indulged in both types of error.

II

The failure of the lower courts to apply jurisdictional requirements has confused these proceedings from their inception. It is not surprising that this litigation is a procedural muddle which can be clarified only by a complete review of the proceedings below. Under the limited grant of certiorari, we do not ask this Court to undertake the necessary review. This could best be done by the trial court upon remand. *Cf. Rayonier, Inc.* v. *United States,* 352 U.S. 350.

ARGUMENT

I

EACH CLAIMANT, IN ORDER TO BE ENTITLED TO INTERVENE IN THE ACTIONS IN THE FEDERAL COURT, MUST SHOW THE PREREQUISITE FOR FEDERAL JURISDICTION, DIVERSITY OF CITIZENSHIP.

A. *IN HOLDING THAT RESPONDENTS COULD INTERVENE "IRRESPECTIVE OF CITIZENSHIP OR AMOUNT CLAIMED," THE COURT BELOW IGNORED SETTLED JURISDICTIONAL REQUIREMENTS AND IMPROPERLY ATTEMPTED TO EXTEND FEDERAL JURISDICTION.*

The citizenship of the parties, plaintiffs and intervenors, is in considerable confusion, probably because, under the law as conceived below, it was not regarded as important. But two intervenors as plaintiffs clearly

appear to be citizens of California, as is the petitioner, defendant below. And Black-Marshall, which should be a necessary party in any event, assuming a derivative recovery as allowed by the Court of Appeals, is an Illinois corporation, and so has common citizenship with many of the respondents. The result of this neglect of jurisdictional requirements was to brush aside one of the oldest and most settled doctrines in the entire field of federal jurisdiction: that in diversity cases involving multiple parties "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the federal courts." Chief Justice Marshall in *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1807).[7]

Sixty-odd years later, in reaffirming the *Strawbridge* case, Mr. Justice Field again emphasized that each party must meet federal jurisdictional requirements:

> ". . . the designation is intended to embrace all the persons who are on one side, however numerous, so that each distinct interest must be represented by persons, all of whom are entitled to sue, or are liable to be sued in the Federal courts. In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several

[7] In the Strawbridge case the Court was construing the Judiciary Act of 1789, 1 Stat. 73, 78, which was formulated in the singular and referred to controversies "between a citizen of the State . . . and a citizen of another State." The constitutional provision covering diversity jurisdiction (Art. III, §2) and the current act (62 Stat. 930, 28 U.S.C., §1332) are cast in the plural. The difference in language does not affect the settled rule of Strawbridge v. Curtiss. See, e.g., Indianapolis v. Chase National Bank, 314 U.S. 63, 69; Smith v. Sperling, 354 U.S. 91, 93.

co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained." (*Coal Co.* v. *Blatchford,* 11 Wall. 172, 174-175 (1870)).

This rule has been the law for a century and a half.

In the present proceeding the only basis for federal jurisdiction is also diversity of citizenship. Yet the Court of Appeals, by holding that additional plaintiffs could intervene "irrespective of citizenship or amount claimed" because the original plaintiff had the requisite diversity, has swept aside the fundamental rule of law so long maintained by this Court. The entire opinion by the court on the jurisdictional issue consists of the following passage:

> "The original complaint [*i.e.*, the complaint by Amen alone] alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry. Co.,* [70] F. Supp. 870; *Dickinson* v. *Burnham,* 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners

in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice p. 3448." (R. 442).[8]

This view of the Court of Appeals, which simply dispenses with jurisdictional requirements for all intervenors, contravenes the established jurisdictional limitations on the United States courts.[9] Under the Constitution and the acts of Congress, jurisdiction of the federal courts is limited to cases arising under the Constitution, laws and treaties of the United States and, where these are not involved—as they are not here—to cases between citizens of different states. The Rules of Civil Procedure, which contain an ex-

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[8] In the trial court petitioner contested the right to bring these actions as spurious class suits under Rule 23(a)(3). Although it was pointed out that the petitions of intervention did not contain any jurisdictional allegations, the argument was directed to the fact that the actions, at best, alleged individual frauds committed by the same person in a different manner and at different times. In the Court of Appeals, petitioner renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a)(3), and therefore each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved."

[9] The opinion strongly indicates that the Court of Appeals initially fell into error by viewing the issue as whether or not jurisdiction over the *original* parties was *lost* by the addition of other *dispensable* plaintiffs lacking jurisdictional requirements, instead of considering whether or not jurisdiction over the additional plaintiffs was *gained* because they had a "common question of law or fact" with the original plaintiffs. This error is a common one, but an error nevertheless, as Professor Moore demonstrates at some length. See 4 Moore's Federal Practice 137-142 (2d ed. 1950).

plicit declaration (Rule 82) that they should not be construed to extend or limit jurisdiction, were not designed as an attempt to set aside the limitations upon federal jurisdiction which have been firmly established for 150 years. On the contrary, Rule 23(a)(3) was designed to deal with a familiar situation—one where a number of individuals had separate claims which might involve common questions of fact or law, or both. Here it was desirable, *where it was possible within jurisdictional limitations,* to try the cases together. The late Judge Jerome Frank summed up the matter with unusual succinctness. "[A] proceeding under 23(a)(3)," he wrote for himself and Judges Learned and Augustus Hand, "is, in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." *Steele* v. *Guaranty Trust Co. of New York*, 164 F.2d 387, 388 (2d Cir. 1947).

Another distinguished appellate judge, Judge Prettyman of the Court of Appeals for the District of Columbia Circuit, has explained why under Rule 23(a)(3) each individual claimant must establish the jurisdictional requisites as to his own claim. In the case before the court the question arose whether the statutory requirement that the claim must equal or exceed $3,000 had been met. Judge Prettyman said:

> "This type of action is spoken of as a 'spurious class action'. The members' interests may be several and not interdependent, although the remaining requisites of the true class action must be met. Their joinder is a matter of economy and efficiency on the part of courts and parties—an

avoidance of a multiplicity of suits. Courts have possessed the power to afford and have afforded this remedy long before the adoption of the new Federal Rules of Civil Procedure. The joinder was and is a matter of discretion in the trial court. However, both at the earlier date and now, when the interests are separate but a joinder is permitted, each individual claim must equal or exceed $3,000 before the action can be prosecuted in a federal court. When the claims are separate, they cannot be aggregated to surpass this jurisdictional threshold." *Knowles* v. *War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914.

Even Professor James Wm. Moore, who as we shall see is the architect of respondents' case, points out that under Rule 23(a)(3):

> "There is no jural relationship between the members of the class. . . . The right or liability of each is distinct. The class is formed solely by the presence of a common question of law or fact. When a suit is brought by or against such a class, it is merely an invitation to joinder—an invitation to become a fellow traveller in the litigation, which may or may not be accepted." 3 Moore's *Federal Practice* at p. 3443 (2d ed. 1948).

In short, a proceeding under the rule is, as Judge Frank put it, "but a congeries of separate suits." [10]

[10] The essential nature of a spurious class action as a group of separate suits, which may be joined as a matter of convenience if the rules of the jurisdiction so provide, is well illustrated by the

So being nothing more than a permissive joinder device, the jurisdictional requirements for such an action are comparable to those of the usual suits in which many parties are joined. These requirements were fully considered by this Court in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, which confirmed that each claimant must individually establish the basis for federal jurisdiction. In the *Clark* case, the fact that one of the many plaintiffs suing to enjoin collection of the

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fact that in the Kansas state courts respondents' actions would have been subject to dismissal for misjoinder of distinct causes of action under G.S. 1949 Kansas 60-601. This statute provides that several causes of action may be united in the same petition, "but the causes of action so united must affect all the parties to the action." Pursuant to this provision and its predecessors, the Kansas courts have uniformly sustained motions to dismiss for misjoinder of causes of action in situations where the claimants could have brought a spurious class suit under the Federal Rules. Holland Oil & Gas Co. v. Holland, 114 Kan. 863, 220 Pac. 1044 (1923); Gallaway v. Purcell, 174 Kan. 659, 258 P.2d 349 (1953); Crisler v. C. K. Packing Co., 181 Kan. 118, 309 P.2d 703 (1957). In the very recent Crisler case, the Kansas Supreme Court, in dismissing the action for misjoinder, held:

> ". . . the contract in question vested separate causes of action in each employee working under the contract. There being separate causes of action, it follows that they cannot be joined in one action because no one party will be affected by the recovery of any other party . . . .
>
> * * * * *
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> ". . . the parties by pleading identical causes of action all have an interest in the subject of the action, but they do not have an interest in all the relief to be obtained.
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> * * * * *
>
> ". . . in the cases where this court has allowed joinder, the reason was because each cause of action represented an interest in a whole sum to be recovered and not a separate sum to separate parties, as sought in this case." (181 Kan. at 119-120, 309 P. 2d at 704).

fees exacted by the California Caravan Act met the jurisdictional requirements was of no comfort to other plaintiffs. Without dissent, this Court announced:

> "It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements.
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> * * * * *
>
> "Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." (306 U.S. at 583-84).

This practice was followed in the case in the Second Circuit which we have already cited, *Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387, where it was held that each claimant in an action under Rule 23 (a)(3) must individually satisfy jurisdictional requirements. In the *Steele* case the court had on a prior appeal expressly invited similarly situated plaintiffs to intervene on remand. On the second appeal, it examined the jurisdictional standing of each plaintiff. Some plaintiffs met the diversity requirements, but lacked the requisite jurisdictional amount. One plaintiff met the jurisdictional amount requirement, but lacked diversity. Only the original plaintiff met all

jurisdictional requirements. Each plaintiff was judged on his own jurisdictional standing; only the original plaintiff survived.

B. *CLAIMED PROCEDURAL UTILITY IS NO BASIS FOR DISREGARDING JURISDICTIONAL LIMITATIONS IN DIVERSITY CASES WHICH, AS THIS COURT AND CONGRESS HAVE RECOGNIZED, MUST BE SCRUPULOUSLY OBSERVED.*

The decision below allowing respondents to intervene without regard to diversity rests on a theory advanced by Professor Moore a year before *Clark* v. *Paul Gray, Inc.* was decided (2 Moore, *Federal Practice* 2241-42 (1st ed. 1938)), and resubmitted by him without any attempt to distinguish the effect of that opinion (3 Moore, *Federal Practice* 3443-44 (2d ed. 1948)).

The sole authority cited by Professor Moore in his first edition (2 Moore, *Federal Practice* 2241-42 and n.24) was *Stewart* v. *Dunham*, 115 U.S. 61, a creditor's bill to set aside a fraudulent conveyance. The reasoning in the *Stewart* opinion negatives the extension of the case to a case like the present one.

> "The right of the court to proceed to decree between the appellants and the new parties did not depend upon the difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be an-

> cillary to the jurisdiction acquired between the original parties, and *it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree.* If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing." (115 U.S. at 64). (Emphasis supplied).

As the *Stewart* decision clearly shows, it was an action of the type now explicitly covered by Rule 23 (a)(2), *i.e.*, one in which "the object of the action is the adjudication of claims which do or may affect specific property involved in the action." In this type of action, as emphasized in *Stewart* v. *Dunham*, all members of the class having claims, regardless of their citizenship, are entitled to the benefit of the decree adjudicating rights in the fund or other property under the court's control. Similarly, in class actions in which the right sought to be enforced is "joint or common"—the so-called true class action coming within Rule 23(a)(1)—a decree is binding on all members of the class. See *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356.

In actions under Rule 23(a)(3), however, as Moore himself recognizes (3 Moore, *Federal Practice* 3426, 3456, 3465 (2d ed. 1948)), other members of the class are not entitled to the benefit of the decree; the decision is *res judicata* only as to the original parties and those who have actually intervened. *E.g.*, *Martinez* v.

Maverick County, 219 F.2d 666, 672 (5th Cir. 1955); *Kainz* v. *Anheuser-Busch*, 194 F.2d 737, 742, 745 (7th Cir. 1952), *cert. denied*, 344 U.S. 820; *California Apparel Creators* v. *Wieder of Calif.*, 162 F.2d 893, 897 (2d Cir. 1947), *cert. denied*, 332 U.S. 816. This distinction between actions under Rule 23(a)(1) and (2) and those under subsection (3) is crucial.[11]

The action under Rule 23(a)(3) differs sharply from the actions under subsections (1) and (2) which are based, respectively, on a joint right and an interest in a definite property within the jurisdiction of the court. In the latter actions the central common interest makes an adjudication binding on all. If the class action were not available in these situations, a claimant would be compelled to join in the action or completely forego his right of recovery. Under subsection (3), however, there is no "common or joint interest", as in *Supreme Tribe of Ben Hur* v. *Cauble*, or fund in the jurisdiction of the court, as in *Stewart* v. *Dunham*. Such an action presents only a series of

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[11] In addition to the fact that the federal courts themselves have consistently recognized that a spurious class action is *res judicata* only as to plaintiffs who are in fact parties to the action, it should be noted that the Kansas law would require the same result. Under Kansas law, the state in which the federal district court sat, a judgment in favor of any member of the so-called spurious class who was not in fact a party to the suit would have been void, incapable of ratification and subject to be set aside on motion at any time. Taylor v. Focks Drilling & Mfg. Corp., 144 Kan. 626; 62 P.2d 903 (1936). The federal court in Kansas would be required, under the doctrine of Erie Railroad Co. v. Tompkins, to reach the same result as to any member of the spurious class who did not intervene. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541; Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530; Angel v. Bullington, 330 U.S. 183.

separate and distinct claims related solely in the sense that there is a common question of law or fact involved and common relief is sought. The claims of absent parties, being separate and distinct, are not involved and a decree is not binding on them. Denial of intervention because of failure to satisfy jurisdictional requirements does not preclude a claimant from his day in court. Its sole effect is to compel a person to bring his action in the proper tribunal.

In contrast to Professor Moore's reliance on *Stewart* v. *Dunham* is this Court's action, in the *Clark* v. *Paul Gray* opinion, of expressly distinguishing the line of cases involving a fund within the jurisdiction of the court:

> "A different question is involved in the case of a creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount . . . . But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court." (306 U.S. at 590, n.2).

Nor is *Clark* v. *Paul Gray* the only occasion when this Court pointed out that the *Stewart* v. *Dunham* rule did not apply to situations where there is no fund within the court's jurisdiction:

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has

direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276, 280.

Significant also in the *Clark* v. *Paul Gray* case is the refusal to permit the possibility, however remote,[12] of an appellate court being "called on to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount [or that he possessed the requisite diversity], even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount [and diversity] for themselves." (306 U.S. at 590). This, of course, is the very danger raised by respondents' construction of Rule 23(a)(3). The rule does not require that *all* questions of law and fact be common; indeed, only *one* need be. A defendant may possess certain defenses against some plaintiffs and different defenses or none at all against others. Under the view taken by the court below, at the conclusion of the trial, the court might well find itself in precisely the unhappy predicament which this Court anticipated in the *Clark* case.

In his second edition Professor Moore abandoned reliance on the *Stewart* case, citing instead the holding in *Shipley* v. *Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947). The "bootstraps" nature of this endeavor has not escaped attention. As Professors Hart and Wechsler have observed in their work, *"The Federal Courts and the Federal System"* (1953):

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[12] The Clark opinion conceded "it appears that such a result could not follow here." 306 U.S. at 590.

> "Professor Moore's principal authority for the view that independent jurisdictional grounds are not needed to support permissive intervention in a 'spurious' class action is the Shipley case, *supra*. The only authority cited in the Shipley case was Professor Moore . . . .
>
> "Is the Supreme Court likely to uphold this use of Rule 23(a)(3) to accomplish so bald an enlargement of federal jurisdiction?" (p. 937).

The baldness of the enlargement of federal jurisdiction is underscored by Professor Moore himself in his discussion of Rule 24(b),[13] upon which rests the court's authority to permit intervention, whether the intervenors are many and hence may proceed under Rule 23(a)(3), or are only one or two.

> ". . . where intervention is sought to present a claim or defense in an *in personam* action and the only basis therefor is a common question of law or fact, there is no reason to permit the intervener's rights to be litigated if they could not have been, had the intervener been joined as an original plaintiff or defendant. Procedurally it may be very desirable to permit the intervention, but it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements . . . . Procedurally it may be wise for a court to allow intervention and

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[13] "24(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . ."

> Rule 24(b) does authorize the court to permit intervention where there is a common question of law or fact. But Rule 24(b) is subject to federal jurisdictional limitations, and if intervention were permitted in this case . . . [the intervener] would be permitted to do indirectly what the jurisdictional rules preclude him from doing directly . . . .
>
> "What has just been said about intervention in an *in personam* action is subject to this qualification: no independent jurisdictional ground is needed to support intervention in a class action, even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved. . . . The reason why intervention in the class action, although such action involves only a common question of law or fact, need not be supported by independent grounds is that *because of the numerous persons involved, the utilization of the representative concept is warranted.* But *in the first* . . . *case* put above where numerous persons are not involved and hence a class action is not warranted by Rule 23(a)(3), *there is no real reason to dispense with the jurisdictional requirements* which . . . [the intervener] would have to satisfy as an original plaintiff." 4 Moore, *Federal Practice* 136-37 (2d ed. 1950). (Emphasis supplied).

Permissive intervention in all actions is governed by the same Rule 24(b), permitting intervention "when an applicant's claim or defense and the main action

have a question of law or fact in common." Why intervention under Rule 24(b) is subject to federal jurisdictional limitations when it is sought in the general run of actions but is free of such restraint when sought in a Rule 23(a)(3) action is not satisfactorily explained. Nor can it be. Why "it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements" in the former actions but not in the latter is not satisfactorily explained. Nor can it be. Moore's contention appears to be simply that when supposed procedural utility [14] is great enough—as he considers it under Rule 23(a)(3)—federal jurisdiction may be expanded; when

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[14] The true considerations which bear upon procedural utility in connection with intervention are far broader than Professor Moore has recognized:

> "Permissive intervention is largely a matter of trial convenience. It is designed primarily to allow litigants in the federal courts to clear up in a single suit, questions which would ordinarily arise in separate *federal* suits. But there seems to be no reason why disputes which, if originally brought, would have been confined to a state forum should be dragged into the national courts. The purpose of the Rule is to facilitate *federal* practice and not to reduce state litigation as well. The protective function of the court is not called into play since the intervener in permissive intervention will not be prejudiced or bound by the original proceeding. The original suit does not create the subsequent litigation or catch the third person in the cross fire of the main litigants. While it would be convenient to clear up these questions in a single suit, as long as the national courts are courts of limited jurisdiction it does not seem reasonable to throw additional burdens on already crowded dockets merely because controversies normally without their jurisdiction are similar or identical in some questions of law or fact to a case properly before them." Campbell, *Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. of Pitt. L. Rev. 1, 10-11 (1940). (Emphasis in original).

procedural utility is not very substantial—as in the ordinary situation—federal jurisdiction must remain within its constitutional limitations. A recent commentator has said of Moore's contention:

> ". . . a distinction which is based simply on the potential number of lawsuits which may ensue seems untenable in terms of the factors which appear to have governed in determining what proceedings are to be treated as ancillary." [15]

As this Court has emphatically stated, in a federal system jurisdictional problems cannot and should not be resolved in terms of procedural convenience or inconvenience. Congress and this Court have consistently recognized the limits on the diversity jurisdiction of the federal courts imposed by the Federal Constitution (Article III, § 2, Cl. 1):

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business . . . . 'The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of con-

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[15] *The Ancillary Concept and the Federal Rules*, 64 Harv. L. Rev. 968, 975 (1951).

> troversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy* v. *Ratta,* supra, at 270. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy." *Indianapolis* v. *Chase National Bank,* 314 U.S. 63, 76-77.

The wisdom of scrupulously confining federal diversity jurisdiction—both in recognition of the interests and responsibilities of the state courts and in seeking to avoid unnecessary burden and strain upon the federal courts—is hardly subject to dispute. Indeed, these factors are so compelling they have resulted in various efforts to narrow diversity jurisdiction or to eliminate it completely.[16]

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[16] See, e.g., H.R. 2516 and H.R. 4497 introduced in the current Congress (providing for an increase to $10,000 in the amount required for District Court jurisdiction and for limitation or elimination of diversity jurisdiction with respect to corporations) on which Subcommittee No. 3 of the House Committee on the Judiciary held hearings on July 12, 1957; H.R. 3098, 82d Cong., 2d Sess. (providing for an increase in the jurisdictional amount designed to reduce the amount of federal court time consumed in handling private cases, including those based on diversity of citizenship) which was passed by the House of Representatives in 1952 (98 Cong. Rec. 5509); S. 466, 79th Cong., 1st Sess. (bill introduced in 1945 with the approval of the Attorney General and numerous federal judges to abolish diversity jurisdiction except for removal by a nonresident defendant in certain instances); S. Rep. No. 691, 71st

As Mr. Justice Frankfurter stated in his concurring opinion in *Lumbermen's Casualty Co.* v. *Elbert*, 348 U.S. 48, 56-59:

> ". . . What with the increasing permeation of national feeling and the mobility of modern life, little excuse is left for diversity jurisdiction, now that *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, has put a stop to the unwarranted freedom of federal courts to fashion rules of local law in defiance of local law.

Cong., 2d Sess. (1930); S. Rep. No. 530, 72d Cong., 1st Sess. (1932) (reporting favorably bills providing for complete abolition of diversity jurisdiction).

In supporting the 1945 proposal, Circuit Judge Denman testified:

"So far as concerns the Federal Government this . . . judicial effort in diversity cases is a waste of time. Until 1938 there existed a judge-created body of Federal common law of tort and contract, often differing from the State law. The same was true of a Federal body of equitable rights. These seemed to justify the diversity jurisdiction. In that year this Federal common law was eliminated by the decision of the Supreme Court in *Erie Railway* v. *Tompkins* (304 U.S. 64)."

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"It is obvious gentlemen, that these State courts are very much better equipped than ours to decide cases involving their own law, and it is submitted that there should be restored to the States the right to make such decisions."

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"The most potent argument then made was on behalf of the great corporations having businesses in many States. These claimed that in construing their contracts, and in determining their liability in personal injury suits, their businesses should not be subject to the vicissitudes of the varying State laws. That principal argument of the opponents of such legislation departed with *Erie Railway* v. *Thompkins* [sic]." (Hearings before Senate Judiciary Committee on S. 466, 79th Cong., 1st Sess. (1945), pp. 2, 5, 6).

"A legal device like that of federal diversity jurisdiction which is inherently, as I believe it to be, not founded in reason, offers constant temptation to new abuses."

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". . . My concern is with the bearing of diversity jurisdiction on the effective functioning of the federal judiciary."

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"Diversity cases have long constituted a considerable portion of all civil cases filed in the federal courts. For the last ten years the proportion of diversity cases has greatly increased, so that it is safe to say that diversity cases are now taking at least half of the time that the District Courts are devoting to civil cases. (This is the conclusion of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts.)"

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". . . the business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant."[17]

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[17] The Annual Reports of the Director of the Administrative Office of the United States Courts lend strong support to these views. The most recent report reveals that diversity cases commenced or removed to the federal courts during the fiscal

Under the view taken by the Court of Appeals, the federal courts could be burdened with time-consuming mass tort and contract litigation. These cases involve no question of federal import but solely matters of local concern. Nonetheless, if jurisdictional standards are dispensed with, such litigation could be brought entirely into the federal courts.

There is no legal basis for so dispensing with jurisdictional requirements. The only reason advanced for this expansion of federal diversity jurisdiction involved is that it would be convenient. Federal jurisdiction has not been, and cannot be, so conferred.

C. FAILURE TO REQUIRE INTERVENORS TO MEET JURISDICTIONAL REQUIREMENTS LEADS TO CONFUSION AND SUBSTANTIVE ERROR, AS IT HAS IN THE INSTANT CASE, AND IS PREJUDICIAL TO THE FUNCTIONING OF A SYSTEM OF COORDINATE FEDERAL AND STATE COURTS.

Failure to require intervenors to satisfy jurisdictional standards, far from being justifiable as convenient or desirable, is, in fact, a likely source of confusion and mischief. The harm that results is well illustrated by the instant case where the failure to follow jurisdictional rules has been reflected in procedural con-

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year ending June 30, 1956, totaled 20,525, accounting for two-thirds of all private cases other than local litigation in the District of Columbia. (Private civil cases dealing with federal questions totaled 7,676, and private civil cases in admiralty came to 2,558.) As the report emphasizes, the number of private civil cases is "significant in relation to the workload of the courts because on the average private civil cases take three times as much time of the judges per case as government cases." See Annual Report of the Director of the Administrative Office of the United States Courts (1956), pp. 62, 214.

fusion and substantive error. From the record, it is hard to determine just when various individuals were permitted to intervene, who was dismissed as party-defendant and when, etc. This is not surprising, considering the failure from the beginning to view federal jurisdictional requirements of any importance.

Moreover, the ability of federal courts to discharge their responsibility in diversity cases is impaired. Allowing parties who should be litigating in state courts to come into federal courts deprives state tribunals of the opportunity to determine the state law questions involved. The federal courts, in turn, are deprived, in adjudicating state law questions brought before them in diversity cases, of authoritative determinations of state law by the state courts. Consequently, the federal court will, as here, either misinterpret or overlook controlling state law.

The majority below indulged in both types of error, which, while not reviewable here under the limited grant of certiorari, illustrate the adverse practical effect of the ruling below. Two examples will suffice.

1. THE FAILURE TO APPLY THE KANSAS LIMITATIONS PERIOD

Here one of the two causes of action was based on the alleged fraudulent issuance at the time of the organization of Black-Marshall Oil Company in 1940, of approximately 32,000 shares of the company's stock to Black without consideration. A total of 122,500 shares of Black-Marshall common stock was issued, all at the time of its incorporation. Of these, 64,870 shares were issued to Black and Deering J. Marshall, Black's original associate in organizing Black-Mar-

shall. Although these shares were issued to Black and Marshall under identical circumstances, it is only Black's half of the block of shares which is challenged in this action as having been fraudulently issued.

Under the Kansas statute of limitations (G.S. 1949 Kansas 60-306) a suit for fraud is barred unless brought within two years after discovery of the fraud.[18] A majority of the Court of Appeals found the statute inapplicable, despite the fact that the evidence of record showed that the plaintiffs had known all the facts relating to the issuance of the stock for at least five years prior to bringing their actions. (The District Court also found [19] that the shares were properly issued for full value received, but this we pass as irrelevant to the present point, which is when did plaintiffs know the facts necessary to discover fraud, if any.)

That plaintiffs were fully apprised of all the facts relating to the issuance of the shares is clear. The evidence shows:

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[18] Under the Kansas decisions, this statute requires that suit be instituted within two years after the discovery of such facts as would on reasonable inquiry and investigation lead to knowledge of the fraud. See Woodworth v. Kendall, 172 Kan. 332, 239 P. 2d 924 (1952); City of Coffeyville v. Metcalf, 134 Kan. 361, 5 P.2d 807 (1931).

[19] The Court found (and Judge Phillips agreed (R. 466-469)) that all 122,500 shares of common stock had been issued in exchange for the five Kansas leases (Finding VI, R. 122-123). It further expressly found that Black and Marshall:

> ". . . were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five Kansas leases." (Finding VI, R.123).

(1) The issuance of the full 122,500 shares, which includes the 32,000 shares here involved, is set forth in the original incorporation minutes (R. 465-466; CR. 1718-1720).[20]

(2) The issuance is also set forth in the minutes of the first meeting of the Board of Directors of Black-Marshall at which the so-called Aledo group, including the respondents, had a majority (R. 467; CR. 1722-1723).

(3) The issuance was also covered in the Black-Marshall stock book (R. 466; CR. 1559-1563).

(4) A recital of the total of 122,500 shares issued for the original five Kansas leases was contained in every annual audit report of the company which was read at the directors' and at the stockholders' meetings (R. 467-468; CR. 1786-1800).

(5) Marshall sold his half of such shares to the corporation at a time when the respondents were well represented by membership on the Black-Marshall Board of Directors and pursuant to a resolution of the stockholders, including respondents (R. 468; CR. 1768-1770, 1795, 1796-1799).

In short, as Chief Judge Phillips emphasized in his dissent:

> " . . . it certainly is beyond the realm of possibility that the Aledo Group, as stockholders, and a portion of them as directors, did not know, at

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[20] References to "CR." are to parts of the Certified Record filed with the Clerk of this Court which were not included in the Transcript of Record printed in this Court.

least more than four years from the time the first of the actions was commenced, all of the facts with respect to the issuance of the 64,870 shares of stock to Black and Marshall." (R. 472.)

If this litigation had been tried in the state court, as it would have been had not all the claimants flocked into the federal court under Amen's jurisdictional passport, the federal court in Amen's case could have had an authoritative ruling by a Kansas state court that the action was barred. It is hard to conceive that it would then have disregarded the state limitations period. Yet, as a result of allowing the indiscriminate intervention in the federal court litigation of plaintiffs who had not satisfied the jurisdictional requirements, the opportunity for an authoritative determination by the Kansas court was eliminated.

2. THE FAILURE TO CONSIDER THE CONTROLLING LAW ON RECOVERY FOR CORPORATE WRONGS

As stated before, the majority of the Court of Appeals held that 32,000 shares were fraudulently issued to petitioner and disposed of the price received for them, not by awarding it to the corporation which it found to have been defrauded but by requiring petitioner to account to the plaintiffs here as some of the former stockholders of the corporation. It would be illuminating to know what state's law the court thought it was applying and how it went about ascertaining that law. But this we shall never know because the majority below did not attempt to determine what state's law

was applicable or the substantive provisions of the applicable law.[21] It is probable that the controlling law here is that of Illinois where the Oil Company was incorporated and where the transaction occurred. But under Illinois law recovery for a fraudulent issuance of shares could be had only on a cause of action derived from the corporation. Its fruits could lawfully accrue only to the corporation. The Court of Appeals itself had recognized in its first opinion that only the corporation had a cause of action for this alleged fraud. It there held that the co-receivers had standing to sue on behalf of the corporation to recover from petitioner the proceeds of the sale of the 32,000 shares. On reconsideration of the case, however, the court believed that this would result in the proceeds of the sale going principally to the National Cooperative Refinery Association as majority stockholder of Black-Marshall. So the Court of Appeals withdrew this first opinion, held that the corporate claims must fail, but evolved the novel rule that Black by allegedly obtaining stock without consideration had committed a wrong for which he must account to some of the former stockholders—the successful respondents.

While the court said that the individual former shareholders could recover for the alleged wrong to the corporation, it is clear that the law of Illinois says

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[21] The Kansas state courts have clearly recognized and diligently discharged their duty to apply the proper substantive law. See, *e. g.*, Columbia Casualty Co. v. Sodini, 159 Kan. 478, 156 P.2d 524 (1945); Pool v. Day, 141 Kan. 195, 40 P.2d 396 (1935); Hamilton v. H. & St. J. Rld. Co., 39 Kan. 56, 18 Pac. 57 (1888).

that they cannot. If Black did not give consideration for his shares, under Illinois law, the wrong results not to the stockholders but to the corporation. A wrong committed against a corporation does not result in any right of action in the stockholders and creates only a right of action in the corporation. Only if the corporation fails to act, may a stockholder bring suit and in such case he acts solely for the corporation in a derivative action and any recovery is for the exclusive benefit of the corporation. See, *e.g., Bingham* v. *Ditzler,* 309 Ill. App. 581, 33 N.E. 2d 939, 946 (1941) (officers and directors charged with converting moneys required to account to corporation, not shareholder praying for an accounting); *Voorhees* v. *Mason,* 245 Ill. 256, 91 N.E. 1056, 1059 (1910) (directors charged with issuing stock to themselves without consideration required to account to the corporation, not to shareholders bringing suit); *Chicago Macaroni Mfg. Co.* v. *Boggiano,* 202 Ill. 312, 67 N.E. 17, 20 (1903) (corporate officer required to repay illegally retained corporate funds to corporation, not to stockholder bringing suit).

Once again, if the action in the state court had continued, that Kansas court would have had an opportunity to determine, as Kansas courts have been alert to do, what law was applicable and what the substantive provisions of that law were. (See Kansas decisions cited, note 21 *supra*).

We have pointed out but two of the instances in which the court below either rejected the applicable law or declined even to determine what law was appli-

cable. Examples could be multiplied from the court's treatment of other substantive law questions were it useful to do so. Enough has been said to make the essential point, that if jurisdictional requirements are disregarded—so that claims clearly belonging in the state courts are improperly allowed into the federal courts—the federal courts are deprived of the precise determinations which under *Erie Railroad Co.* v. *Tompkins* they are obligated to follow.

II

This Cause, Which Has Been Characterized From Its Outset by Error Resulting from Failure to Apply Federal Jurisdictional Requirements, Should Be Remanded to the Trial Court for Consideration of Such Jurisdictional Requirements.

Once the conclusion has been reached, as we submit it should, that the intervenors must severally meet federal jurisdictional requirements, the question remains of applying that conclusion to this litigation. The failure of the courts below to consider jurisdictional requirements important and to apply them has confused these proceedings since Amen first saw fit to bring suit in the Federal Court in Kansas. Procedurally, the litigation is best described as a muddle, which can only be clarified by a complete review of the proceedings below.

The grant of certiorari was limited to the determination of the basic jurisdictional question. It is not fitting—indeed, it is hardly possible on this record—and we do not ask this Court to undertake this review of

the proceedings and application of the jurisdictional rules to them. This should be done upon remand.

The initial task, upon remand, must be to establish the citizenship of the parties. Two respondents, Kenneth D. and Hazel Constant, seem clearly to be citizens of California. They do not have the requisite diversity of citizenship with petitioner Black. Beyond this, however, the inquiry becomes more complicated and requires reopening the record for new evidence on the citizenship of the plaintiffs. Most basically, in view of the decision below invalidating petitioner's 32,000 shares of stock, the determination must be made whether Black-Marshall was and is a necessary party-defendant in any such recovery.[22] Black-Marshall, we contend, is a necessary party defendant. Thus, there is no basis for federal jurisdiction based on diversity since an alignment of parties would show citizens of Illinois on both sides of the controversy.

Although unraveling the jurisdictional errors is a formidable task, it is submitted that, once this Court determines the question presented here, the trial court will be best able to do so. *Cf. Rayonier Inc.* v. *United States,* 352 U.S. 315.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed with directions that the

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[22] In a proceeding in which shares of a corporation are cancelled, and where the plaintiffs admitted that the corporation was in antagonistic hands (See Par. 15 of complaint, R. 8, 18), it is clear that the corporation must be aligned as a party defendant. Smith v. Sperling, 354 U.S. 91; Venner v. Great Northern Railway, 209 U.S. 24; Doctor v. Harrington, 196 U.S. 579, 587; Davenport v. Dows, 18 Wall. 626.

cause be remanded to the District Court for re-examination in light of the controlling jurisdictional rules.

Respectfully submitted,

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AUGUST, 1957

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Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM H. BLACK and RUTH F. BLACK,
Petitioners,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER J. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HOWARD D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. B. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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NOVEMBER, 1957.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 13

WILLIAM H. BLACK and RUTH F. BLACK,

Petitioners,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents attempt to circumvent consideration of the question on which this Court granted certiorari. This Court, they claim, was persuaded to grant the petition for certiorari on the "representation" that the litigation involved an action under Federal Rule of Civil Procedure 23(a)(3)—that is, an action in which there are tried together a group of separate and distinct

claims as to which there were common questions of law and fact and a claim to common relief. That the litigation involves this question seems to come as a complete surprise to them.

Unhappily this new-found position of respondents is squarely contrary to the one they have taken from the start of the litigation. From the outset they have asserted that intervention was justified, without satisfying jurisdictional requirements as to each intervenor, *because* this was a class action under Rule 23(a)(3). This view was adopted by the Court of Appeals. Whether or not Rule 23(a)(3) justifies this conclusion is the precise question in issue in this Court. Nowhere hinted, nowhere suggested, nowhere involved was respondents' latest suggestion that this is a class action involving claims to a common fund within the court's jurisdiction.

A second basis for federal jurisdiction now suggested—that a claim under federal law was alleged in the complaint—is argued for the first time in respondents' brief. It suggests, again, respondents' distaste for meeting the jurisdictional issue now before this Court for resolution.

Moreover, despite protestations against our characterization of the case as a "procedural muddle," we submit that respondents' new-found arguments confirm this to be the plain fact. For they show, perhaps more clearly than ever, that to dispose of this case demands the continued presence of the corporation, Black-Marshall Oil Company, as a party to this suit, and that a formidable task remains for the trial court once the applicable jurisdictional rule has been determined.

One further matter deserves brief comment—respondents' assertion that petitioner's Statement contained almost none of the facts necessary to an understanding of the claims involved in this suit. Based on this assertion, respondents have presented their own version of what transpired. Petitioner's statement of the case was drafted in the light of this Court's limitation of issues to the jurisdictional question. But, in view of disparaging references to petitioner's character and conduct which tend to color a technical argument, it is proper—indeed, in fairness, necessary—to state that the trial judge, who saw and heard petitioner and clearly recognized that he was telling the truth, expressly found that petitioner was not guilty of any fraud (R. 134); that respondents' stock interests in the company had been purchased in 1944 and 1945 for their full value (R. 132); and at a time when petitioner had no knowledge that his alleged agent, Ives, had misrepresented any facts to respondents (R. 126, 129, 130). As the court found, the subsequent increase in value of Black-Marshall shares resulted from an exceedingly successful drilling program and a sharp rise in the price of oil (R. 133). We must go further and insist, in view of respondents' statement that petitioner acquired a large interest in the company—32,000 shares—without consideration, that the trial judge found all of petitioner's shares, including the 32,000 shares, were properly issued for his interest in Kansas oil leases (R. 123). Moreover, all these transactions, including the issuance of these shares, were approved by corporate action at meetings at which respondents were well represented (R. 465-468; CR. 1718-1720; 1722-

1723; 1786-1800). In short, the record shows that petitioner Black, in fact, enabled all of these respondents to profit handsomely on their original investment.

I

RESPONDENTS' CLAIM IN THIS COURT THAT THIS IS A HYBRID CLASS ACTION INVOLVING INTERDEPENDENT CLAIMS TO A COMMON FUND IS IN DIRECT CONFLICT WITH THEIR POSITION IN BOTH COURTS BELOW, AND CANNOT BE RECONCILED WITH THE FACTS OF THE CASE AND THE APPLICABLE LEGAL AUTHORITIES.

Respondents' brief is devoted almost entirely to a claim—asserted in this Court for the first time in this suit—that the present litigation concerns interdependent claims to a fund in court, and that accordingly the intervening plaintiffs were not required to establish independent grounds for federal jurisdiction. Absent from respondents' brief is any attempt to meet the issue on which certiorari was granted, which is referred to only in a Parthian and somewhat obscure three-page "appendix". Understandably, therefore, respondents' sharp change of course has brought their new position into collision with their argument in both courts below (that this action was a class suit under Rule 23(a)(3)), with the facts of this case, and with the decisions governing class actions and ancillary jurisdiction in the federal courts.

A. *RESPONDENTS' POSITION IN THIS COURT IS CONTRARY TO THEIR POSITION IN THE COURTS BELOW AND TO THE DECISIONS OF THOSE COURTS.*

(1) At the time the District Court first considered respondents' motions to intervene as plaintiffs, counsel

for respondents explicitly stated in his opening comment on these motions that "this is a spurious class case under Rule 23."[1] In the course of his presentation, counsel reemphasized that respondents relied on Rule 23(a)(3) to intervene in this class action. He pointed out that, in respondents' view, the advantages of a Rule 23(a)(3) action were to toll the statute of limitations and to establish jurisdiction regardless of whether

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[1] The discussion of the motions opened as follows:

"The COURT: How about these motions of the other folks to intervene? Should the Court rule upon those, gentlemen?

"Mr. SMITH: I would like to be heard very briefly, Your Honor. If they are opposed, I am not sure, as things stand here, that they are opposed, we want to bring these other stockholders in in order that they can come in and get their rights as stockholders established and show specifically their reliance upon these misrepresentations. We think we have followed the rules here. I don't think I ought to take the time of the Court to make reference to these rules and discuss them categorically, but the same transactions are involved here, the two complaints are the same, the petition of intervention in the other, and we do ask the Court to grant that petition and we ask the Court to authorize our amendment and the reason, I may say, Your Honor, why we included in our motion requests for permission to dismiss these other defendants is this: The rules provide that where a class case is begun, and *this is a spurious class case under Rule 23*, that it may not be dismissed without consent of the Court and I think that that probably doesn't require the Court's action with reference to individual defendants, the dismissal of whom does not constitute the dismissal of the case, but to be safe we did ask the Court's authority in this motion to dismiss those defendants." Pp. 51-52 of Transcript of Proceedings held before the District Court for the District of Kansas on Sept. 25, 1950, taken by Harold Pittell, official reporter of the Court. A copy of the Transcript of these proceedings has been filed with the Clerk of this Court.

Unless otherwise indicated italics are supplied throughout this brief.

there was diversity.[2] Respondents' position is perhaps most clearly revealed in the following colloquy:

> "Mr. SMITH: May I begin this way, the intervening petition in every respect parallels the complaints, the amended complaints, in those two cases, so that they are setting up the same causes of action that are stated in the amended complaints in those cases. Now, why do they need to be filed and why do they need to be tried? Certain proceedings have been started in a representative case on their behalf. We interpret the decisions of the 10th Circuit to mean that the plaintiffs, the equitable stockholders who want to establish their right to restitution to their status of legal stockholders, must come in and prove their reliance upon the misrepresentations that they succumbed to and to proceed in the case as plaintiffs.
>
> "I refer to the Dunnett case and the Greer case, decided by Judge Phillips in this circuit. That is the way we interpret those decisions, as making it necessary for the individuals to pursue those rights.
>
> "Secondly, we are contending here, as held in the cases that I have just referred to, that a transaction of this kind constitutes a sale of assets and

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[2] As counsel succinctly put his view of the proceedings, if the respondents' intervening petitions were not granted, "they would lose the advantage of this filing here which has tolled the statute and it is because of the jurisdictional features and the tolling of the statute that is all the advantage you get under one of these spurious class actions under Rule 23, those two things, as I understand it." *Id.*, p. 62.

that the rights are corporate, but we are forced to recognize the possibility that some Court might hold, notwithstanding those cases, that it was the sale of stock and that all these rights here, in the final analysis, will be found to be individual rights of these stockholders. And it is for that reason that we have brought this so-called spurious class action under Rule 23 which permits us, as we respectfully think, to bring in all of these parties.

"Now, because that is a spurious class action, as we understand it, we get advantage of that as far as these other plaintiffs are concerned, only by tolling the statute and by establishing diversity as between the parties bringing the action and the defendants, and that they must come in and assert themselves their individual rights.

"The COURT: Does the rule use the expression 'spurious rights'?

"Mr. SMITH: No, it does not, sir. That is a word that has been injected into this by text writers on procedure and by the courts.

"The COURT: Well, if you have a class action you don't have to make everybody a party plaintiff or defendant, do you?

"Mr. SMITH: Well, Your Honor, it is our understanding that we cannot safely rely on these other plaintiffs being before the Court under such circumstances that they can recover unless they come in here and establish individually that they are entitled to have their stock back. There are cases to the effect that those are individual rights that they must establish for themselves.

"The COURT: So it wouldn't be a true class action?

"Mr. SMITH: And that is the reason I speak of it as coming under this paragraph which has been referred to as permitting so-called spurious class actions, where you don't get the whole value of complete representation, but you only get certain technical advantages such as tolling the statute and establishing jurisdiction for—as a matter of whether there is diversity or not.

"May I say, Your Honor, I don't think we ought to be put at the peril of trying to decide at this juncture whether we are right about that. We ought to be permitted to have them in here and let this thing proceed to a determination on its merits."[3]

(2) In a "Brief on Jurisdiction" filed by respondents in answer to petitioner's contention at a pretrial conference of March 7, 1952, that the District Court lacked jurisdiction, respondents again argued precisely the point which is now to be determined by this Court. They stated the issue to be as follows:

"The sole relevant question is whether other members of the class may intervene without an independent showing of jurisdiction where the representatives of the class who initiated the action have complied fully with the jurisdictional requirements." (p. 5)

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[3] *Id.* pp. 63-66.

Respondents' position on this question is the one which we challenge. According to respondents, who placed major reliance on Professor Moore and quoted his *Federal Practice* for support, the controlling principle was:

> "In a class action under Rule 23(a)(3), it is not necessary for the members of the class, intervening subsequent to the initiation of the action, to establish independent grounds of jurisdiction so long as the original plaintiffs meet the jurisdictional requirements." (*Ibid.*)

(3) On final briefing in the District Court the issue was again clearly drawn—it was the very issue which is still in the case and the question on which this Court granted certiorari. Petitioner first contended that each plaintiff sought redress for an alleged wrong to himself and that the action was not a class action since each plaintiff was interested only in his own recovery.[4] The brief went on:

> "Even if the case could be denominated as a class action, it would of necessity be a spurious class action under Rule 23(a)(3). In spurious class actions each claimant has a distinct and separate claim and there must be independent grounds for jurisdiction including diversity and the requisite jurisdictional amount. The spurious class action is purely a joinder device to allow the trial of many claims together which involve common questions of law and fact. The claims

[4] Brief for Defendants, p. 29.

> can not be aggregated to reach the jurisdictional amount. (Citations) Those who intervene in such an action already brought should also show independent grounds of jurisdiction. (Citations)"[5]

In reply, counsel for respondents argued in detail that the suit was an action under Rule 23(a)(3). They explicitly relied on Professor Moore to support the position that intervening plaintiffs need not establish independent grounds for diversity jurisdiction in Rule 23(a)(3) class actions.[6] And they quoted Professor Moore's further comment that the Rule 23(a)(3) class action has been useful in suits where large numbers of purchasers or holders of securities claim to have been defrauded by a defendant's common course of dealing. See 3 Moore, *Federal Practice* 3448 (2d ed. 1948) (the precise reference the Court of Appeals below relied upon in allowing plaintiffs to intervene without independently showing diversity of citizenship).

(4) The briefs in the Court of Appeals equally demonstrate that the basic jurisdictional dispute concerns the applicability of Rule 23(a)(3) to this action. Respondents described it thus:

> "In the present cases, substantially the same representations were made by the same individual with respect to the same transaction and at approximately the same time . . . [*t*]*he inquiry is whether* [*this case*] *presents common questions of law or fact* . . . All of the questions of law or

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[5] *Id.* p. 30.

[6] See Reply Brief for Plaintiffs and Intervenors, pp. 10-14.

fact regarding Black's liability are common questions . . . *The present cases, therefore, are clearly within* the authority of Rule 23(a)(3)."[7]

Petitioner continued to stress that this suit at best alleged individual frauds (which the District Court found petitioner had *not* committed) by the same person in a different manner and at different times. Accordingly, the litigation was not properly an action under Rule 23(a)(3), but was rather a series of separate suits in which each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved."[8] Respondents go far beyond the limits of plausible interpretation in their attempt in this Court to twist this argument into a concession by petitioner that intervening plaintiffs in a Rule 23(a)(3) suit need not independently meet federal jurisdictional requirements. Petitioner, in urging affirmance of the careful factual findings of the District Court in his favor, limited his presentation on jurisdiction to his basic opposition to treatment of this litigation as a class suit. The subsidiary argument that jurisdictional requirements must be individually satisfied even if a class suit was involved was not conceded. Petitioner simply found it unnecessary to brief the point, which was encompassed within his basic position.

(5) The Court of Appeals itself, contrary to respondents' claim in this Court, recognized that the necessity for intervening plaintiffs to satisfy jurisdictional

[7] Appellants' Reply Brief, p. 4.

[8] Appellees' Brief, pp. 86-87.

standards was an issue in the action. The court below opened its opinion with this statement:

> "The first [claim] is a *spurious* action by the appellant stockholders of the Black-Marshall Oil Company . . ." (R. 441)

The court then discussed the jurisdictional question posed by the intervention of various plaintiffs in this spurious class action without alleging diversity of citizenship. It disposed of the issue in the following passage:

> "The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry. Co.*, 70 F.Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when

Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448." (R. 442)[9]

The conclusion is unmistakable. From the day the motions to intervene were first presented to the District Court through the final decision by the Court of Appeals, all parties recognized that this litigation concerned "separate and independent" claims which could, at most, permit a class action under Federal Rule

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[9] Apart from the clear language of the Court of Appeals demonstrating its recognition of the jurisdictional problem this action poses, the authorities cited by the Court of Appeals also indicate that it considered the jurisdiction question to be whether intervening plaintiffs need establish independent grounds for federal jurisdiction in an action under Rule 23(a)(3). The Shipley case cited by the Court below is perhaps a landmark decision supporting the view that intervention in a Rule 23(a)(3) class action may be had without regard to jurisdictional requirements. It is cited by Professor Moore in Volume 3 of his Federal Practice at page 3443, note 3, to uphold his argument that independent grounds for federal jurisdiction are unnecessary. And Professor Moore points to the Dickinson case, likewise cited by the Court below, for the same point in the supplement to his section discussing the jurisdictional issue in Rule 23(a)(3) actions. Professor Moore's erroneous interpretation of Dickinson—in fact a Rule 23(a)(2) action—as a Rule 23(a)(3) case is clear; but it is likewise clear that the Court below cited the Dickinson decision from the supplement to Moore's discussion of 23(a)(3) actions for the same point: that independent grounds of jurisdiction are not demanded of intervenors. That the Court of Appeals so employed the Dickinson and Shipley cases and decided the jurisdictional issue on which certiorari was granted is also confirmed by the Court's citation to Volume 3, page 3448, of Professor Moore's treatise. There, Moore expressly states, as respondents quoted in their District Court brief, that the Rule 23(a)(3) actions have been useful in cases where shareholders allege to have been defrauded of their corporate interests by a defendant's conduct.

23(a)(3). Respondents—contrary to their new position in this Court—insistently urged that this was a class action under Rule 23(a)(3) and that, under the thesis of Professor Moore, intervenors need not independently satisfy jurisdictional grounds. The Court of Appeals agreed with them, holding explicitly that this was a spurious class suit—that is, a Rule 23(a)(3) suit—and that therefore the interventions were properly allowed "irrespective of citizenship or amount claimed." The question presented in this Court squarely raises the issue of the correctness of this holding.

Putting to one side all of the foregoing, respondents now assert that this litigation involves interdependent claims to a common trust fund subject to the control of the court. Under this new view, the case now falls within Rule 23(a)(2), the "hybrid" category, and all of the claims of the intervenors now become ancillary to that of the original plaintiff, Amen.

As has been seen, respondents never took this view of the case in either of the courts below. The reason they did not is apparent.

B. *THIS CASE IS NOT A CLASS ACTION UNDER RULE 23(a)(2) AND IS NOT ONE IN WHICH THE CLAIMS OF RESPONDENTS CAN BE SAID TO BE ANCILLARY.*

Despite the new complexion which respondents would put on the case, it is clear that the courts below recognized that each of the plaintiffs was presenting a separate, distinct and individual claim for damages. The Court of Appeals, while holding that the litigation was properly brought as a class suit under Rule 23(a)(3) because plaintiffs alleged substantially the same facts and sought common relief, plainly recognized that

the claim of each plaintiff was separate and of like dignity, with none subordinate or ancillary to the other, and that each plaintiff must independently establish his claim. Thus the court specifically ruled that the six plaintiffs who did not appeal from the adverse judgment were no longer in the case (R. 452), and also explicitly held that one of the appealing plaintiffs, McBride, had not established his case and the dismissal as to him must therefore be affirmed (R. 453). With respect to the "successful appealing shareholders," it is equally clear that they were to be entitled to individual money judgments against Black. The court gave the following outline as to how such judgments were to be computed:

> "The successful appealing shareholders are entitled to money judgments against Black equal to the values of their equitable stock holdings in Black-Marshall sold to N.C.R.A. in 1947, less sums already received for such interests.
>
> "To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

> "Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (R. 460)

Under this portion of the decision each successful respondent is entitled to be considered an equitable stockholder (or, perhaps, a legal one) at the time of the 1947 sale.[10] He is said to be entitled to share in the purchase price in an amount equal to the ratio of the number of his shares to the total number of validly outstanding shares. In determining this latter figure, the court directs that some 32,000 of the shares issued to Black be cancelled,[11] and that "any shares arbitrarily retired by Black prior to such sale" (in 1947) be reinstated. When these corrections have been made, the amount of each successful respondent's recovery is determined by a simple mathematical computation. This amount is, as we have said, fixed.

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[10] The court below in another portion of its opinion stated that respondents "ceased to be either legal or equitable stockholders" (R. 454).

[11] The figure of 32,000 shares is referred to for identification purposes only. Even under the theory of the Court of Appeals, a maximum of less than 29,000 shares is involved.

Because proof is required to determine a preliminary fact—*i.e.*, the total number of shares at the time of the sale determined as directed by the court—respondents jump to the totally unwarranted and unconnected conclusions that respondents' claims are "interdependent" and that they are "claims to a common fund." The first conclusion comes from associating as identical two conceptions which are quite different. The conception that the total amount of stock outstanding must be corrected is regarded as synonomous with the conception that the ratio of each plaintiff's stock to the corrected total depends upon—*i.e.*, is determined by—the success or failure of his co-litigants in this case. The second conclusion—that there is a common fund to be divided—does not even have an intellectual basis. It is unsupported assertion.

Let us first consider the court's direction that, in recomputing the total outstanding shares, some 32,000 shares issued to Black must be excluded. This involves a simple operation in cancellation and subtraction, unaffected by the status of any respondent. There is no interdependency here.

As for the determination of the number of "validly issued" shares involved in the 1947 sale, this also is a figure which does not depend on the number of plaintiffs or intervenors in this action and their success or failure in this litigation. It depends upon proof—proof from which the District Court must decide which of the shares retired should be considered to have been validly outstanding at the time of the 1947 sale. At the time of the sale in 1947 there were other shareholders beside Black and those involved in this case.

Prior to the sale, shares of persons other than those here involved had been retired. Some of these persons have begun other actions; more have not.

Furthermore, not all of the shares sold by plaintiffs and intervenors here were retired. According to respondents themselves, 13,590 of these shares were still outstanding in 1947.[12] Clearly, then, the success of respondents equitably entitled to 13,590 shares will not affect in any way the amount of "validly issued shares."

But this is not the only mathematical fallacy in respondents' assertion. Many thousands of shares were retired which never belonged to plaintiffs or intervenors in this action.[13] If any of these be counted as "validly issued shares" as of the time of the sale, the total number of such shares would be increased by a factor having nothing to do with the success of these respondents.

Respondent's theory that there is a fund to be divided into as many portions as there are successful litigants here is not only factually and mathematically wrong, not only contrary to the opinion of the Court of Appeals, but is wholly inequitable. This is not a case of playing for a pot where the winner takes all; and the fewer the winners, the greater the take. Each respondent under the decision below is to recover the entire amount which such person lost and petitioner

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[12] This is the difference between the total number of shares sold by the plaintiffs and intervenors in this action, 47,196 (CR. 1887) and the number of these claimed to have been "arbitrarily retired", 33,606. Resp. Brief, p. 27.

[13] See Exhibit E-1, CR. 1928.

gained from him. Under respondents' view, as illustrated by the table on page 27 of their brief, if Amen were the sole successful plaintiff, the number of "arbitrarily retired" shares to be reinstated would be 80 and the per share value at liquidation would be $81.56, whereas if all claims in this litigation had been upheld, the value at liquidation would be $48.66. Both the error and the injustice of this conclusion are at once evident. The total number of "validly issued" shares at liquidation is a fact to be determined. It does not depend on who, or how many, sue or where they sue. It depends upon proof.[14]

In determining the fact from the proof, a court must decide the number of "validly issued" shares at the time of liquidation. This does not mean that all the claimants have to join with Amen in bringing a single suit, or that they could do so if they could not independently satisfy the jurisdictional requirements to bring their own claims into the federal courts. As in any number of other litigations involving money judgments, facts that go beyond an individual plaintiff's

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[14] It might be that the trial court in making the determination as to the number of "validly issued" shares would, on the basis of the proof before it, take a simple course. It could, for example, conclude that all shares retired by the single corporate action were to be considered "validly issued". On the other hand, the trial court could determine that, for the purpose of a formula for per share recovery, only the shares of the successful respondents would be added to those considered as "validly issued". Even if the trial court were to follow this procedure, which as seen above is both illogical and inequitable, this still does not make the claims interdependent or provide a fund to be divided among the successful litigants here.

interest must be considered in working out the recovery —here the amount per share—to which he is entitled. This can be done, and should be done, by the trial court in a case involving a single plaintiff, just as it would be done if three or four or twenty plaintiffs were involved in a single case.

Once determined by the trial court, and not until then, the number of "validly issued" shares is a fixed figure. It does not, as respondents contend, turn on the number of successful plaintiffs in this litigation. Each of the respondents here had an independent claim, and each was entitled to bring his own action against petitioner. If other plaintiffs chose to join in the litigation under Rule 23(a)(3), each nonetheless was asserting his individual claim that he was defrauded.

It was solely the choice of an individual whether to join in this litigation. Other individuals could, and in fact some did, choose to bring their own individual suits against petitioner.[15] Many stockholders, deciding that no legitimate basis existed for questioning the sale of their Black-Marshall holdings, did not sue. Whatever course any individual determined to take, he had to plead and prove his own independent cause, *i.e.*, that petitioner was responsible for false representations made to him and on which he reasonably relied to his detriment.

But regardless of who might or might not have sued, and in what courts, the number of validly issued shares

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[15] Two other suits by single individuals, also former stockholders of Black-Marshall Oil Company, are pending in the same Federal District Court where this case was tried: Blazer v. Black, Civil Action No. 3467, and Ranney v. Black, Civil Action No. 5481.

at liquidation is a fact to be determined like any other fact. In this determination some shares once owned by plaintiffs and intervenors will be reinstated; some will not, because the shares were never cancelled. The same may be said of the shares of others not involved here. To contend in this situation that the claims of the parties in this suit are interdependent is without any foundation whatever. The truth is that the same proof may in some instances affect both the failure or success of parties to this suit, and also the number of validly issued shares—or it may not. In this situation, it cannot be said that because the same proof may affect the determination of a mathematical fraction which in turn, enters into the computation of the recovery on separate claims, the claims are therefore interdependent.

C. *HERE SEPARATE CLAIMS OF FRAUD ARE TRIED TOGETHER BECAUSE "A COMMON QUESTION OF LAW OR FACT" IS PRESENTED AND "A COMMON RELIEF IS SOUGHT" UNDER RULE 23(a)(3).*

This litigation falls directly into the pattern of those cases in which persons claiming to have been defrauded of stock or other corporate securities can unite to sue in a class action under Rule 23(a)(3). A long line of decisions, including those relied on by respondents in both lower courts, confirm that, both before and after the promulgation of the Federal Rules, situations such as the present one were always recognized as involving individual interests which neither claims of fiduciary relationship nor of proportionate or interdependent interests in recoveries could make into "hybrid" class actions. In addition to *Steele* v. *Guar-*

plaintiffs are cotenants or the like. (Citations) It is true that the bill charged that the defendant was in a fiduciary relationship to each of the former noteholders and that he dealt with them without disclosing information which would have influenced their sales to him; but a separate wrong was committed against each noteholder when the defendant dealt with him without disclosing the facts, and each transaction was in reality the basis for a separate suit, depending for its outcome upon how much was disclosed to the noteholder in question. . . . *Nor is there any single fund in which all must share; on the contrary, the trust fund is separable, and* [*defendant*] *must hold all that he made on resale of each note as constructive trustee for the defrauded holder of that note. The defrauded noteholders had no common fund.* . . . [Plaintiff's] suit was a 'spurious class suit', and the decree does not bind those who are not parties. . . ." (48 F. 2d at 14)

The point was made with equal clarity in *Miller* v. *National City Bank,* 166 F. 2d 723 (2d Cir. 1948). There plaintiff alleged that he and other bondholders had been defrauded by false representations which prevented them from instituting their claims for payment until the statute of limitations had run. The court disposed of the claim that plaintiff was entitled to an accounting for a fund in the following terms:

"Appellant seeks to distinguish the case [Hackner v. Guaranty Trust Company, 117 F. 2d 95] by saying that he is not seeking damages, but

an accounting for the entire fund. Nevertheless, regardless of his prayer, his action still sounds in fraud. In order to recover he must show not only the misrepresentations but also reliance on them. Reliance is a factor personal to each participant. A judgment holding appellant had or had not relied on misrepresentations would not bind appellee in a suit by another participant. The case, therefore, falls under the category of a 'spurious' class suit, and there can be no aggregation of claims." (166 F. 2d at 728)

Likewise, because this action concerns individual frauds having no relation to a common fund, the concept of ancillary jurisdiction cannot be invoked to sustain intervention without each intervenor independently meeting federal jurisdictional requirements. Ancillary jurisdiction may exist where a plaintiff representing a class proves the cause of action determinative of the claims held by other members of the class. Thereafter, other members may intervene without the necessity of proving jurisdictional facts in order to claim their portion of a fund out of which all claims are to be satisfied.

The basic principles of ancillary jurisdiction, where a fund drawn into the court's custody is made the basis for its jurisdiction over claims of intervening parties seeking an interest in the property, were announced in *Hoffman* v. *McClelland*, 264 U. S. 552, and *Fulton National Bank* v. *Hozier*, 267 U. S. 276. But even in these landmark cases, this Court refused to allow intervention, without meeting jurisdictional re-

quirements, by parties claiming against the defendant under separate and individual transactions having nothing to do with a particular fund.

Creditors' bills brought by one or more but less than all creditors of a defendant to set aside a fraudulent conveyance and appoint receivers are perhaps the most common illustrations of ancillary jurisdiction. See, *e.g.*, *Stewart* v. *Dunham*, 115 U. S. 61, and *Handley* v. *Stutz*, 137 U. S. 366. Similarly, the decision in *Dickinson* v. *Burnham*, 197 F. 2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875, so strongly relied upon by respondents, is a good example of a "fund" decision analogous to suits by creditors. But respondents cannot avoid the plain fact that the present action differs sharply from the *Dickinson* case and that a Rule 23(a)(3) proceeding is involved here.

In the *Dickinson* case, the basic question involved was whether the alleged wrongdoers had improperly utilized a subscription fund. The claims were brought by two of the subscribers on behalf of the group. There was no question of individual frauds committed against these particular subscribers. The only issue was whether the claimed wrongdoers had fraudulently misused the subscription fund as against all subscribers. The court's decision was that they had, and this established the right of all subscribers to the fund to recovery.

In sharp contrast, we are concerned here with separate frauds alleged to have been committed against individuals. If one respondent prevails in his view that he was defrauded by petitioner, it brings no common fund in court and establishes no right of any other respondent. In *Dickinson* the claimants were

establishing the rights of all subscribers to share in a fund. In the present litigation each claimant was establishing solely his own separate and distinct right to redress for an individual claimed fraud. The nature of the *Dickinson* case was specifically recognized by the court, which pointed out that no one suggested or claimed a right to "full recovery from [the wrongdoer] as on an ordinary tort liability for conspiracy and defrauding" (197 F. 2d at 980).

If the *Dickinson* case were to be distorted as respondents urge, all claims for separate and individual frauds, which have been uniformly recognized as involving suits under Rule 23(a)(3), would become hybrid class actions. The concepts of ancillary jurisdiction would be radically expanded to bring innumerable local law cases into the federal courts. Indeed, any notion that the *Dickinson* case could be used to authorize alleged victims of a fraud to label the fruits of the individual wrongs a "fund", in order to maintain a hybrid action, was dispelled by the Court of Appeals for the Second Circuit in a later opinion, *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F. 2d 687 (2d Cir. 1954), *cert. denied*, 349 U. S. 915. There a complaint was brought on behalf of some 400 union members for damages sustained as a result of a conspiracy to bribe an officer of their international, but was dismissed *inter alia* for failure of any one member to show the requisite jurisdictional amount. Even the willingness to reduce the amount of aggregate damages to a sum equal to the amount of the bribe itself could not change the spurious nature of the class action:

"By asserting 'unjust enrichment' in the amount of the bribe, reducing the ad damnum clause from $600,000 to $36,000, as 'at least' the amount of the aggregate damage, and calling this a 'fund' to which plaintiff [union] is entitled 'as trustee,' plaintiff has merely added verbiage. There is no fund. The claim remains one on behalf of 400 separate individuals for the damage suffered by each due to the alleged tortious conduct of defendant....

* * *

"... what is plainly a series of separate and distinct claims cannot be transmuted into 'a single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone and casting the prayer for relief in the form of a declaratory judgment proceeding affecting the disposition of a so-called 'fund'." (217 F. 2d at 695)

In this litigation, the claim of each respondent is separate and distinct. Only because common questions of law or fact are involved and common relief is sought may their cases be tried together. Respondents fully recognized in the courts below that this was necessarily so under the applicable authorities. The issue which was controverted was whether individual jurisdictional requirements could be disregarded in this type of action. As we have seen, respondents argued they could be. They prevailed in the court below in this view. Petitioner, for the reasons given in his original brief, submits that there is no basis for so neglecting

the established limitations on federal jurisdiction, and that this Court should resolve the question by determining that intervenors must severally meet federal jurisdictional requirements.

II

RESPONDENTS' CLAIM THAT ONLY THE CITIZENSHIP OF A FEW PLAINTIFFS IS INVOLVED DISREGARDS THAT THE CORPORATION MUST BE A PARTY-DEFENDANT, THUS DESTROYING DIVERSITY FOR ALMOST ALL PLAINTIFFS.

Respondents seek to minimize the importance of the basic jurisdictional issue on which certiorari was granted by claiming that only the citizenship of two plaintiffs, Mr. and Mrs. Constant, is not diverse from that of the defendants. In this manner, respondents avoid discussion of whether Black-Marshall Company is a necessary party-defendant in this action, contenting themselves with the comment that the Court of Appeals

> "held that respondents' right to have the 32,000 odd shares fraudulently issued to Black excluded from participation in the proceeds of the sale was *not* sustained as a corporate claim but was one inhering in the former stockholders as beneficiaries of the trust (R. 454-55)." Resp. Brief at 57.

As a matter of fact, respondents asserted a claim to these 32,000 shares only on behalf of the corporation and adhered to this position throughout the proceedings below. The Court of Appeals itself recognized that respondents made only a corporate claim to such shares (R. 455). Since any contention made relative

to the 32,000 shares was made solely as a corporate claim, there was no issue before the Court of Appeals pursuant to which it could grant an individual recovery with respect to these shares. *Cf. Howard* v. *Furst*, 238 F. 2d 790, 793 (2d Cir. 1956), *cert. denied*, 353 U. S. 937. Respondents' claim is therefore a mere matter of words. If the relief granted by the Court of Appeals is viewed in a practical light, the corporation must be joined as a party-defendant in this action.

Nor is discussion of this important question foreclosed by the limited grant of certiorari. Quite obviously, decision on whether or not the corporation is a party is vital to the final outcome of this suit, after this Court's determination of the basic jurisdictional question.

Respondents are seeking to cancel shares of the corporation issued to Black and to reinstate shares of their own alleged to have been fraudulently cancelled. This, apparently, is how the majority below viewed the effect of its decision, for the formula it announced to measure petitioner Black's liability demands consideration of which shares were "validly issued" and which were "arbitrarily retired" (R. 460). The shares respondents would cancel are those issued to Black as his part of the 64,000 the District Court found to have been payment for the five Kansas leases Black and Deering Marshall contributed to the corporation (R. 123). The shares to be reinstated are those retired by the corporation after they had been purchased in 1944 and 1945 at a price representing their then true value (R. 132). In both instances, of cancellation and reinstatement, respondents demand the doing of an act by the corpora-

tion. This is true regardless of how respondents have endeavored to frame their complaint or request for relief.

If, then, this suit involves cancellation or reissuance of shares, the necessity of Black-Marshall Company's participation as a party is not open to doubt. This Court declared over 75 years ago in *Kendig* v. *Dean*, 97 U.S. 423, that a corporation is an indispensable party in any suit to cancel shares of its stock. This ruling was re-affirmed in *Crump* v. *Thurber*, 115 U.S. 56, and *St. Louis & San Francisco Ry.* v. *Wilson*, 114 U.S. 60. Similarly, this view has been widespread in decisions of state tribunals. See, *e.g.*, *Bruschke* v. *Chicago Schuetzen Verein*, 145 Ill. 433, 34 N.E. 417 (1893); *Campbell* v. *Morgan*, 4 Ill. App. 100, 105 (1879); *Mitchell* v. *Beachy*, 110 Kan. 60, 202 Pac. 628 (1921); *Muellhaupt* v. *Strawbridge Estate*, 298 Pac. 189 (Ore. 1931). Courts require the corporation as a party to such actions for several reasons. First, the relief sought necessitates a corporate act—cancellation of stock on the corporation's books; the corporation's records are unavoidably affected. A further reason is that the corporation must be bound by the judgment rendered disposing of its stock. The judgment could not run against the corporation unless it were a party. And, not being bound, the corporation could later, on its own or through other stockholders, sue the defendant again were it dissatisfied with the first judgment. Were the corporation not a party, the first judgment would have no *res judicata* effect as to it. See, *e.g.*, *Dean* v. *Kellogg*, 294 Mich. 200, 292 N.W. 704 (1940); *Turner* v. *United Mineral Lands Corp.*, 308 Mass. 531, 33 N.E. 2d 282 (1941).

In their sparse discussion of these issues respondents make an elliptical footnote reference to the fact that the receivers have been active plaintiffs in this litigation (Resp. Brief, p. 57, n. 23). This is no answer to petitioner's claim that the corporation must be a party in order to insure that the interests of *all* stockholders—not only the plaintiffs—and, indeed, the interests of petitioner be protected. Furthermore, it is obvious the receivers cannot perform this function.

Most significant is the fact that the receivers cannot properly represent the corporation, for their part in the litigation in the courts below and in this Court conclusively shows that they cannot adequately represent all the former stockholders of Black-Marshall Oil Company. As respondents themselves acknowledge, the receivers were appointed at the instigation of the original plaintiff, Amen, immediately after he instituted suit (R. 370). Since their appointment, they have allied themselves completely with the respondents. Their complete identification in interest with the respondents is best illustrated by the continued presence, as counsel for respondents in this Court, of one of the receivers himself, despite the fact that the Court of Appeals dismissed the receivers' claims (R. 455) and, not having petitioned for review, they no longer have any place in this suit. In fact, despite the receivers' being out of the case, all three counsel who appeared solely for them in the courts below are still actively litigating the issues here as counsel for respondents. Obviously, these admittedly partisan interests cannot serve to represent the corporation and all of its stockholders.

Given these facts, petitioner maintains that Black-Marshall must be a party to this suit and properly is a party-defendant. Since the receivers cannot be its proper representatives, the corporation becomes aligned as a party-defendant. Under the Court of Appeals decision, shares of the corporation are to be cancelled and others revalidated. In this situation, the corporation must be aligned as a party-defendant in accord with the settled rule established as early as *Davenport* v. *Dows*, 18 Wall. 626, and reaffirmed most recently in *Smith* v. *Sperling*, 354 U.S. 91. Once this is done, federal diversity falls, since an alignment of parties would place citizens of Illinois on both sides of the controversy.

III

THERE IS NO SUBSTANCE TO THE CLAIM THAT FEDERAL JURISDICTION OVER THIS ACTION CAN BE SUSTAINED ON THE GROUND THAT A FEDERAL CAUSE OF ACTION WAS ALLEGED.

To create an alternative basis for federal jurisdiction, respondents argue that, entirely apart from diversity of citizenship, jurisdiction of the federal court in this case is founded upon the existence of a federal question. This is based on respondents' new claim that petitioner's actions violated Rule X-10B-5 of the Securities and Exchange Commission issued under Section 10(b) of the Securities Exchange Act of 1934.

Even if it be assumed that respondents' District Court complaint alleged an action under Rule X-10B-5 —which, as seen below, is simply not the case—this

latest of respondents' new positions is extremely flimsy. There is no basis for saying that the allegation of some federal claim—never litigated, referred to or considered after initial allegation in the complaint—can support federal jurisdiction over an action involving state law and where federal jurisdiction is grounded solely on diversity. The authorities cited in respondents' brief on this point, such as *Hurn* v. *Oursler*, 289 U.S. 238, all concern situations where a federal cause of action, which was also joined with a non-federal cause of action, had been actively litigated. In each proceeding, the federal cause was either of primary importance or of equal importance with the state cause as a ground for recovery, and in all of these cases the federal cause had been diligently pursued. The principles applied in these decisions thus have no application in this suit.[17]

Here, there was not even an express allegation, let alone a count, describing a federal action. Although respondents now mention that an allegation in the amended complaint was "based upon" Rule X-10B-5, the Rule itself and Section 10(b) of the Securities Exchange Act of 1934 (pursuant to which the Rule was issued) were not even referred to in the amended complaint. Indeed, the first time that they have been mentioned in this case is in respondents' current brief in this Court. The only reference to the Securities Ex-

[17] To support federal court jurisdiction of a claim alleged to be under a federal statute, the statute involved must be an essential element in plaintiff's cause of action. The cause must basically and necessarily concern the federal act; the statute must not be a collateral element or of mere possible interest. See, *e.g.*, Gully v. First Nat'l Bank, 299 U. S. 109; Howard v. Furst, 238 F. 2d 790 (2d Cir. 1956), cert. denied, 353 U. S. 937.

change Act of 1934 in the entire history of this proceeding is found in a list of statutes cited in a single paragraph of the amended complaint.[18]

Respondents not only failed to allege a federal action in their complaint, but they in no way alluded to a federal cause of action at trial, in their briefs, in their proposed findings submitted to the trial court,[19] or in any consideration of the case in the Court of Appeals. They assert now, for the first time, that jurisdiction is based on a federal cause never alleged, never briefed and never argued. The plain fact is that this case was tried as, and is, a diversity case, in which the respondents' claims should have been measured by Illinois law where the purported representations took place.

This Court, in *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77, characterized a similar belated attempt to raise a federal question on which jurisdiction may be founded "as an afterthought" which would

[18] The paragraph in the amended complaint lumped together citations to the Federal Securities Act of 1933, the Securities Exchange Act of 1934, a section of the Federal Criminal Code, and citations to state securities acts.

That respondents never really thought a federal claim was in the case is illustrated by the fact that not until a few weeks ago did they suddenly discover that even this single reference to the Securities Exchange Act of 1934, in the bunching with citations to other federal and state statutes, had been omitted from the printed record in the Court of Appeals and in this Court. They thereupon found it necessary to file a motion on October 26, 1957 to correct the record.

[19] Plaintiffs' only requested finding on jurisdiction was that the single original plaintiff, Amen, was a citizen of South Dakota and thus had diverse citizenship with defendants. No claim was made that jurisdiction was based on a federal question of any kind (R. 96).

not be accepted. There, in a diversity case, the Court rejected plaintiff's allegations that a contract cause of action arose under a federal statute as "much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the United States." See also *Robinson* v. *Anderson*, 121 U.S. 522; *Blumenstock Bros. Advertising Agency* v. *Curtis Pub. Co.*, 252 U.S. 436, 441.

Here, respondents cannot even spell out a colorable claim that a federal cause of action was actually involved. The claim can hardly be dignified as even being "an afterthought," and is completely without substance.

CONCLUSION

The respondents sought to take advantage of the so-called "spurious" class suit under Rule 23(a)(3) to bring this litigation into the federal courts. As we have emphasized, the use of this permissive joinder device in an effort to extend the jurisdiction of the federal courts over what are essentially local law questions runs afoul of federal jurisdictional requirements. It is a source of confusion and mischief. This Court limited its grant of certiorari to this basic jurisdictional question. Respondents, seeking to avoid determination of this question, devote their brief to new contentions contrary to those they advanced in the courts below. These belated arguments cannot be sustained under the principles which govern this litigation.

Respondents' refusal even to attempt to support the decision of the Court below on its jurisdiction seems a

recognition by respondents themselves that it was wrong and cannot be supported.

For the reasons stated here and in petitioner's main brief, which stands unanswered, we respectfully submit that the judgment of the Court of Appeals should be reversed with direction that the case be remanded to the District Court to determine, after proper alignment of necessary parties, which claimants meet the controlling jurisdictional rule—that each claimant must independently satisfy federal jurisdictional requirements.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~340~~ 13

WILLIAM H. BLACK AND RUTH F. BLACK,
Petitioners,

vs.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES AND LARRY STITES, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY LOIS L. STITES, THEIR MOTHER AND NEXT FRIEND; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER AND FRED E. WINDISH, Co-Receivers of BLACK-MARSHALL OIL COMPANY, A CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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October, 1956.

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QUESTIONS PRESENTED.

1. The jurisdictional question actually presented is whether an independent jurisdictional ground is needed

to support the intervention of an additional member of the class in a class suit involving interdependent claims asserted by representatives fully meeting the requirements for diversity jurisdiction. This class action is not, as is assumed in petitioners' statement of a much mooted jurisdictional question, one based solely upon the presence of common questions of law and fact in otherwise separate and distinct claims. The complaint sought, and the decision of the Court of Appeals requires, a proportionate distribution of the proceeds of a common fraud, held in constructive trust, among the members of the class of defrauded persons. The several claims of the members of the class against those proceeds are so related that the amount of each depends upon the disposition of the others. The several claims involved are not, therefore, separate and distinct but are interdependent.

2. Petitioners' second question as stated commingles two separate questions: (a) whether the Court of Appeals misapplied substantive law and (b) whether it overturned findings of fact in the face of Rule 52(a) of the Federal rules of Civil Procedure. Only the first of these questions is really presented. The decision of the Court of Appeals does not depend on setting aside findings of fact, regardless of whether they were or were not "clearly erroneous," but on conclusions of law based on undisturbed findings and undisputed facts.

STATEMENT.

The basic facts in this case, as found by both courts below and not denied by petitioners, are that respondents were the victims of a cruel fraud of which petitioner W. H. Black was the direct and immense beneficiary. The principal question presented by the action was simply whether Black is liable to account for the proceeds which accrued to him from that fraud. Although these proposi-

tions are basic and undeniable they do not emerge from the Statement in the Petition.

Petitioners' principal point is that the Court of Appeals "so disregarded the rules of appellate review and the function of a Federal Court of Appeals as to require reversal by this Court." Petitioners accuse the Court of Appeals of a disregard of the trial court's findings, of the evidence, and of settled legal doctrine so gross that the charge amounts to one of bad faith.[1] Fairness to that court would have required a compete and undistorted Statement showing the claims involved, the facts established by the evidence, and the differences between the decisions of the trial court and the Court of Appeals. This has not been provided.

Petitioners' statement of the individual claims places great emphasis on allegations not included in the amended complaint on which the case was tried and not material to the claims as upheld by the Court of Appeals. (Compare R. 2-10 with R. 12-19.)

The individual and derivative claims as alleged and upheld were more accurately stated by the Court of Appeals as follows:

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[1] "After this departure from what the record shows and the trial court found in fact occurred, the majority below was forced once more to reject settled legal doctrine in order to enhance the respondents' ultimate recovery * * *" (Petition, p. 28.)

"On an unprecedented theory which reflects a complete failure to attempt to determine applicable law, the majority of the court below * * *" (Petition, p. 28.)

"In achieving them [errors of substantive law] the majority of the court below was persistent, ingenious and, as regards legal principles, wholly original." (Petition, p. 29.)

"So the majority withdraw this highly unsuccessful effort and tried again * * *" (Petition, p. 30.)

"To achieve this conclusion the court entirely reconstructs the negotiations and agreements between the parties as found by the District Court. This is rigorous but at least it produced the desired result." (Petition, p. 31.)

"The first [claim] is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

"The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders." (Petition, App. p. 51; see R. 12-19, 26-29, 43-45, 51, 57-72.)

A statement of the facts giving rise to these claims and of the bases of the decisions of the trial court and the Court of Appeals would have placed in its true light the imputation of an improper motive to the Court of Appeals.

The undisputed facts were as follows:

Early in 1938 W. H. Black went to Illinois for the purpose of participating in oil developments in that state. (R. 616-17, 1149.) His previous experience[2] in numerous

[2] This experience included a conviction on five counts of an indictment charging the unlawful use of the mails in furtherance

other areas had been unprofitable and it was necessary for him to establish a source of funds to finance his proposed operations. (R. 617, 1225.) To advance this purpose Black utilized the services of Dale G. Ives, of Aledo, Illinois, a small community in which Ives was an attorney, many of the respondents being numbered among his clients and acquaintances. (R. 146-47, 189, 191-92, 617, 1221.) As a result of these contacts, the Petroleum Investment Company was formed in the fall of 1938. (R. 616-17, 1222.) The agreement establishing that enterprise designated Black as party of the first part and the group of men and women who had been induced to participate in the venture as parties of the second part. (R. 617-18; Ex. 4, R. 1524-25.) It recited the purpose of the association to be to lease and develop oil properties, and set out the expert qualifications of Black with respect to activities of that character. It provided that Black was to receive 25% of all net profits for his services and that the parties of the second part were to receive 75% of the net profits, apportioned according to the relative amounts of their respective investments. Even at this early stage of his dealings with the Aledo people, Black had persuaded them to put their full trust in him. (R. 146, 619, 1223.) This is reflected in the following provision of the agreement with the Aledo group, which included many of the respondents herein:

> "It is further mutually agreed by and between the parties hereto, that the party of the first part shall be the authorized agent of the parties of the second part, to transact all business of every kind and nature under and in connection with said agreement without inter-

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of a scheme to defraud, the scheme having involved the acquisition and development of oil and gas leases. (R. 1220; No. 1997 Cr., District Court of the United States for the Southern District of Texas; judgment of conviction entered on December 16, 1924; Hon. J. C. Hutcheson, Jr., presiding.)

ference from any parties of the second part." (Ex. 4, R. 1524-25.)

After several months of unproductive drilling in southern Illinois, Black moved his operations to Kansas, where he joined another promoter, Deering J. Marshall. (R. 145, 190, 620-21, 1227-29.) Marshall was to secure leases and Black to do the financing. (R. 1150.) Five leases were acquired in Kansas, all of which were subsequently transferred to the Black-Marshall Oil Company. (R. 147, 150-51, 190, 194, 630-31, 637, 641-42; Ex. 65, R. 349-50.) During this period Ives, on Black's behalf, continued to solicit contributions from the Aledo group which were transmitted to Black. (R. 626-27, 1222-23, 1241-42, 1469.) In his answers to interrogatories Black admitted that during the period of operations in Kansas, prior to the incorporation of the Black-Marshall Oil Company, he received $30,000.00 from this source, for use in acquiring and developing the Kansas leases. (R. 231.) Black's testimony on cross-examination shows that the total out of pocket cost of acquiring and developing the leases, including his personal expenses, was substantially less than the total funds contributed by the Aledo group. (R. 1251-61; Ex. 10, R. 228-31.)

As matters progressed in Kansas, Black proposed to the Aledo group the formation of a corporation to replace the Petroleum Investment Company. (R. 639, 1251, Ex. 8, R. 226-27.) The incorporation meeting of Black-Marshall Oil Company was held at Ives' office in Aledo, Illinois, on January 11, 1940, and was attended by Ives, Black and the other members of the Petroleum Investment Company. (R. 639-40.) At this meeting the Aledo people were told by Black and Ives that they would receive stock in the new company on the basis of their total prior contributions, at the rate of a share of common for each $2 invested and a share of preferred for each $4. (R. 148-51, 192-94, 241-

43, 303-06, 417-18, 469-70.) A stock list had been prepared in advance of the meeting, showing the number of shares to be issued to each investor, and on this list the amount of stock to be issued to Black was set at 11,000 shares or less. (R. 148, 192-93, 241, 418, 644-45.) When the stock was actually issued on January 23, 1940, Black received 10,000 shares of common and 1,000 shares of preferred. (Ex. 97, R. 1557-61; Ex. 101, R. 1569-74.) In addition, however, some unknown person (both Black and Ives denied doing it) filled out certificates 5 to 14, inclusive (which had been signed by Black as President but not by Ives as Secretary), to "W. H. Black et al." for 64,870 shares of common stock. (Ex. 97, R. 1557-61; Ex. 101, R. 1569.) Black denied that these certificates were ever validly issued or, in fact, issued at all. (R. 1285-87.) Subsequently, the minutes of the 1941 meeting at Aledo and the stock list presented at that meeting, presided over by Black, showed Black as the holder of only 11,000 shares. (Ex. I, R. 1767-68; R. 244, 474-75, 491, 550-51.) On the day of that meeting, however, certificates 5 to 14, inclusive, were marked cancelled and the 64,870 shares represented thereby were issued to "W. H. Black" on new certificates signed by Black and Ives, each stub bearing the notation "Correction of name only." (Exs. 97, 98; R. 1559-63.) When examined as to this action Black testified: "I don't propose to explain because I can't explain it, sir." (R. 1289-92.) Black turned over half these shares to Marshall and kept the other half. (R. 1192, 1206, 1479.) Ultimately he sold that half of the 64,870 shares thus issued for $51.06 per share.[2] (Ex. 98, R. 1561-63; Ex. 99, R. 1564; R. 874.)

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[2] The trial court found: "Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five leases." (Finding VI, Petition, App. p. 7.)

The 64,870 shares thus issued, together with all the shares originally issued to Black, Marshall and the members of the Aledo group, were charged on the books of the Company against the five Kansas leases, the total thus charged being 122,500 shares of common and 9,055 shares of preferred. (R. 1157, 1281, 1289; Ex. R, R. 1845.)

At the incorporation meeting, Black was elected president, chairman of the board of directors, chairman of the finance committee and chairman of the executive committee. Ives became a director and secretary-treasurer. (Ex. I, R. 1721-22.) They continued to hold those positions until the company was dissolved in 1947. (R. 420.)

Throughout the existence of the Petroleum Investment Company Ives had served as Black's agent in Aledo. (R. 146, 620-21, 1222.) Practically all funds for transmission to Black had been given to Ives. (R. 1226.) All information, particularly with respect to the Kansas operations, had come from Black to the Aledo people through Ives. (R. 621-22, 1295-96; Exs. 6-11, R. 223-34.) At the incorporation meeting, Black told the Aledo people that Ives would continue as he had in the past to act as Black's representative in his dealings with the Aledo people. (R. 244-45.) At the 1941 corporate meeting held at Aledo, Black again assured the Aledo people that Ives would be his representative with respect to all Black-Marshall matters and substantially the same statement was repeated at the only other stockholders' meeting held in Aledo, that of January, 1944. (R. 152-53, 158, 197, 201, 244-45, 266, 281, 358, 361, 387, 392-93.) Black testified as to Ives' agency, on direct examination, as follows:

The court made no reference, however, to the circumstances under which the 64,870 shares were issued. The Court of Appeals considered those circumstances decisive in concluding that they were purely promotional stock issued "surreptitiously, covertly, and we say fraudulently, to Black." (Petition, App. pp. 65-66.)

"Q. All right, now, do you remember telling them that you were constituting Dale Ives as your agent to act for you in all matters?

"A. I expect I did, because everybody—they were all wanting information from time to time, day after day, and I said I just can't possibly—we had such a small organization—I believe the first two years we didn't even have a secretary. I think pretty near all the letters we had—the girl could type but she couldn't take dictation—and I think most of the letters we just had to write in longhand or use a telephone, and I believe, I might have told them that, sir." (R. 1168-69.)

The manner in which this relationship between Black, Ives and the Aledo people was fostered and developed is shown by a mass of correspondence introduced by petitioners themselves. (R. 1296.)

By means of an extensive campaign in 1943, Black purchased most of the Black-Marshall stock held in Chicago (Exs. 17-23, R. 287-95.) Immediately thereafter the chain of events which ultimately resulted in depriving the Aledo group of their shares began. The basis for this result was laid at the January, 1944 stockholders meeting. The stockholders were concerned with getting a return on their stock, and after a discussion of various methods, Black was authorized to sell the *producing* properties only for a sum sufficient to net the stockholders not less than $8.00 per share. (R. 280-81, 391-92.) Black advised the stockholders that he would keep them informed through Ives with respect to any sale. (R. 158, 201, 308, 392-93, 476, 536, 1296.)

In the course of subsequent negotiations with National Cooperative Refinery Association (N. C. R. A.), Black reached an agreement by which he was to procure 51% of the Black-Marshall stock to turn over to N. C. R. A. (Ex. 344, R. 1659-60.) This deal fell through a few days

later and Black instead made arrangements with N. C. R. A. for financial support of an extensive drilling campaign. (Ex. 345, R. 1660-62.) In the meantime, however, Black had communicated the terms of the proposed deal to Ives. (Ex. 122, R. 1590; R. 1312-14.) In a letter of May 14, 1944, Ives referred to the failure of the deal with N. C. R. A. and advised Black that he had had "it worked out so that we would buy one-half of the stock held here for $10.00 per share and pay a part of it when we made the deal with Co-op and the balance next year * * *." (Ex. 122, R. 1590.)

On May 18, 1944, Black wrote Ives and asked him to "write or call me and tell me the number of shares you think could be acquired in Illinois." (Ex. 123, R. 763.) Thereafter, sometime in June of 1944, *Ives told the Aledo people that Black had called him and had directed him to tell the stockholders that the producing properties had been sold; that it was necessary for them to send in one-half of the stock to bind the deal; that the sale price would net each one about $10.00 per share on the first one-half of their stock and probably more on the second one-half which was to be turned in at a later date; that the other undeveloped leases were being retained; and that two years after completion of the sale a new company would be started for the purpose of developing those properties.* (R. 679-82, 158-60; Ex. 12, R. 233-34.)

On the basis of these misrepresentations, respondents turned in the first one-half of their stock. (R. 159-62, 201-02, 246-47, 269-70, 281, 310-11, 328-29, 362-63, 394-95, 422-23, 449, 451-52, 476-77, 494-95, 508, 521-22, 536-37, 546, 593-94, 926-27, 942-43.) Black then sent the Company plane to bring Ives and the stock to Kansas. (R. 682.) Black also arranged a transfer of 5,000 shares to A. W. Kincade, a Wichita banker, and 10,000 shares to each of two men, Roos and Gill, whom Kincade had brought in on

the deal. (Ex. 100, R. 1565-67; Ex. 102, R. 1574-75.) The stock, which had been acquired in Aledo at $10.00 per share, was sold to Roos and Gill for $12.50 per share. (R. 888; Ex. 111, R. 601-02.) Their checks, totaling $250,000, were deposited in Black's account and the funds were immediately transmitted to Ives on Black's order to be used in paying for the stock. (Ex. 89, R. 1541-42, Ex. 104, R. 581; Ex. 111, R. 601-02; R. 889-90.) Black and Kincade then paid a commission of $10,000 to a George Heiser and the remaining $40,000 profit was divided between Black and Kincade. (R. 1321-23.)

The additional shares acquired from the Aledo group in 1944, totalling 11,714, were paid for by the use of Company funds. (Ex. 88, R. 1541; R. 872-73, 890, 1333-34.) The money was sent to Ives and deposited in his special account. (R. 888-90; Ex. 87, R. 1540; Ex. 89, R. 1541-42.) On the Company records the funds were charged to Black's stock account. (Ex. 87, R. 1540; Ex. 88, R. 1541.) On August 15, 1946, Black transferred these shares to himself on Certificate No. 398. (Ex. 100, R. 1567-68; Ex. 119, R. 1588.) In June of 1947 Black sold this stock to N. C. R. A. for $51.06 per share, realizing a profit of about $500,000 after settling his account with the Company out of the proceeds. (R. 874-75, 889-90; Ex. 100, R. 1567-68.)

Late in 1944 the Aledo people received checks written on Ives' special account, in which the money from Black had been deposited, totalling $10.00 per share. (R. 685-86, 162, 202, 247, 269, 281-82, 311, 329, 363, 396, 423, 449, 451, 477, 494-95, 508, 522, 537; Ex. 89, R. 1541-42.) Those who had turned in more than one-half of their stock received the excess on new certificates. (R. 160-61, 202, 269, 310, 449, 452, 537.)

Thus, at this time, Black, with Ives' assistance, had secured one-half of the Aledo stock. Although some had

been resold to Roos, Gill and Kincade, Black had 11,714 shares purchased by him with company funds in his lock box at Great Bend. (R. 857-58, 1351-52, 1354.) The resale to Gill and Kincade was, moreover, only temporary, for in the fall of 1945, at about the same time that $12 per share was being paid for the rest of the Aledo stock, Black reacquired their stock by paying them $17.50 per share out of Company funds. (Exs. 115, 116, R. 1581-83.)

In March of 1945, Kincade wrote to Black suggesting a sale of the Company's *producing properties*. (Ex. 106, R. 582-84.) He further suggested that it would be desirable "to give some thought in advance of such sale of eliminating the greater part of a large family of stockholders." (Ex. 106, R. 583-84.) Black and Kincade submitted the matter to two accounting firms for their advice as to the exact procedure to be followed. (Ex. 278, R. 1607-10.) The reply from the accounting firms, dated August 24, 1945, reveals the plan of action proposed in March of 1945. (Ex. 106, R. 582-84.) The second and fourth paragraphs of that letter to Black and Kincade are particularly significant:

> "You have informed us that the present outstanding capital stock of the corporation is represented by 173,000 shares, no par value, divided about as follows:
>
> | | |
> |---|---|
> | Black and Kincade | 74,000 |
> | Deering Marshall | 30,000 |
> | Others | 69,000 |
> | Total | 173,000 |
>
> • • • • •
>
> In connection with the outstanding stock, it is our further understanding that the Marshall stock is under option to purchase by you or the Company at $12.00 per share, and the 69,000 shares, or a substantial part thereof, have been or will be acquired by you at $17.50 per share." (Ex. 278, R. 1607-08.)

This discloses Black's determination in March of 1945 to acquire the balance of the shares.

Shortly after Black's receipt of this letter from his accountants, Ives contacted the Aledo people and told them that Black had directed him to get in the balance of their stock. (R. 687.) Spencer Berglund, who had lived in Aledo but later moved to Florida, received the same instructions from Ives by wire dated August 29, 1945:

> *"Sold producing property Black-Marshall Oil Company twelve dollars share, kept all Landowners Royalty Company. Sign stock in blank forward Fourth National Bank, Wichita, Kansas care Arthur Kincade, immediately. Must be closed September first."* (Ex. 81, R. 1538.)

In response to this same misrepresentation, the Aledo people turned in the remainder of their stock and Ives forwarded it to Black at Great Bend, Kansas. (R. 164-66, 171, 202-03, 248, 270-71, 282, 311, 364, 395-96, 425-26, 449, 452, 478, 497, 509-10, 523, 538, 548, 595, 928, 943; Ex. 12, R. 1532; Ex. 81, R. 1538.) On October 14, 1945, Ives advised Black that he had forwarded "the balance of the outstanding common stock held in this community." (Ex. 86, R. 1539-40.) Black-Marshall checks were then sent out in the amount of $12.00 per share and the funds thus used were charged as an advance to Black. (Ex. 108, 109, 110, R. 1576-79; Ex. 288, R. 1613; R. 871-72.)[4]

In the meantime, Black wrote to one Allen James at Chicago in an effort to get some stock held by Mr. George Ball of Muncie, Indiana. In this letter Black stated:

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[4] The trial court found that Ives made these misrepresentations, delivered the shares obtained to Black of Black-Marshall, and distributed the payments. (Findings VII, VIII, Petition, App. pp. 7-13.) The trial court found, however, as to both 1944 and 1945 that "These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge." (Petition, App. pp. 10, 13.) The Court of Appeals assumed this to be true in holding Ives' misrepresentations to be legally imputable to Black on principles of agency. (Petition, App. p. 58.)

"I tried to call you on the phone today only to find you were out of town. I am anxious to know if it is possible to buy the stock held by Mr. Ball or any of the other stockholders we acquired through your group. I am working on a deal to sell the Company or rather the stock of the Company and *have all the other shareholders lined up.* I have never approached any of your crowd, as I feel you can better handle them than I." (Ex. 25, R. 296; emphasis added.)

Black testified with respect to this letter as follows:

"Q. * * * But in any event you did tell Allen James that you had all the other stockholders lined up as of August 16th, 1945, didn't you? A. I believe I did, yes.

"Q. And the only way you could have the Aledo people lined up was through Dale Ives? A. That is right." (R. 1344.)[5]

The Aledo people had now been eliminated, but some of them felt that Black, as the President of the Company, might be able to furnish some information about the transaction. In the fall of 1945, Dr. Wadleigh wrote to Black and asked for further details about the sale described by Ives. (R. 204.) Black then called Ives and asked for his advice as to what Wadleigh should be told. (R. 694-95.) Ives' reply to this call is contained in his letter to Black on November 10, 1945:

"Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Co. were sold except the property not developed in the Landowners Royalty Co.

[5] Despite the undisputed facts as to the long-established relationship between Ives and Black in dealing with the Aledo group the trial court concluded that: "The evidence does not establish that Mr. Ives was the agent of Mr. Black." (Conclusion of Law VI, Petition, App. p. 18.) Reversal of this conclusion of law was the principal ground for the decision of the Court of Appeals that Ives' false representations are legally imputable to Black. (Petition, App. pp. 58-59.)

> which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing and that at the end of two years if any developing is done on the Landowners Royalty property we will have to put up the money, by we I mean the old stockholders of the origi al Company." (Ex. 12, R. 1532-33.)

Black admitted the receipt of this letter. (R. 1354.) It is impossible to overstate its significance, for at the time Black received it he had Ives' previous letter of October 14, 1945, advising him that Ives had succeeded in obtaining "the balance of the outstanding common stock held in this community." (Ex. 86, R. 1539-40.) Practically all of this stock, including that temporarily transferred to Gill and Kincade, was in Black's lock box at that time, subject to his unquestioned dominion and control.[6] (R. 1351-52, 1354, 1363-64, 878, 1093-94, 1096.)

Dr. Wadleigh did not receive any reply to his letter to Black. (R. 204, 1387.)

Black had thus succeeded, as a result of Ives' misrepresentations, in "eliminating the greater part of a large family of shareholders." In the accomplishment of this objective, Black-Marshall funds were used and Black's stock account was charged $831,483.06. (Ex. 288, R. 1613; R. 870-73, 1554.)

In 1947 Black realized the benefits of these transactions by a sale to N. C. R. A. Preliminary to and in preparation for the sale, Black caused to be transferred to himself 11,714 shares held as street stock on Certificate No. 398. (Ex. 100, R. 1567-68.) This was part of the stock fraudu-

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[6] The trial court found that Black received Ives' letter and took no action as a result of it. (Finding X, R. 128, Petition, App. p. 14.) This finding provided another sufficient ground for the conclusion of the Court of Appeals that Ives' false representations are legally imputable to Black. (Petition, App. pp. 59-60.)

lently acquired from the Aledo people in 1944. (R. 574-75, 698-99, 1375-76.) The remainder of the street stock, some 56,000 shares, was marked retired for the purpose of balancing Black's stock account. (R. 1382, 1193, 1098-99.) Since Black at that time held a preponderant majority of the stock in his own name, this purported retirement achieved substantially the same effect as a direct transfer of that stock to Black. (R. 1098-99.) In further preparation for the sale, Black caused the Company's minutes to be reviewed and revised. (R. 782-85, 960.) He then transferred 62,126 shares to N. C. R. A. for $51.06 per share; 3,000 shares held by Ives, as Executor of the Boyd Estate, were also transferred to N. C. R. A. (Ex. 99, R. 1563-65.) This gave N. C. R. A. a controlling interest and it proceeded to dissolve the corporation. (R. 1135.) The other stockholders had previously agreed to convey their distributive interests in the assets to N. C. R. A. for an amount equal to $51.06 per share and did so. (R. 1134-35.)

From the distribution of $51.06 per share, Ruth F. and William F. Black received $234,928.74; Black received $2,814,929.06; and Ives, as Executor of the Boyd Estate, received $135,930.00. (Ex. 291, R. 1633-34, 1639.) An escrow fund of $497,819.21 was also created in which the interest of Ruth F. Black was $39,123.29, the interest of W. H. Black $357,224.50 and the interest of Ives, as Executor of the Boyd Estate, $17,250. (Ex. 284, R. 854.)

Upon discovery of the manner in which they had been victimized by Black and Ives, the Aledo group confronted Ives, who then admitted the hoax that he and Black had effected in 1944 and 1945. (R. 170-71, 205-06, 312-13, 398-99, 511, 539.) Shortly thereafter these cases now before this Court were instituted.

The trial court's Findings of Fact[7] leave no doubt of the basic points that the Aledo shares were acquired by Ive's fraudulent misrepresentation and were delivered to Black (Findings VII and VIII, Petition, App. pp. 7-13), that if Black did not himself contrive and direct the fraud, as respondents believe, he acquired full knowledge that the shares were obtained through gross misrepresentations but did nothing (Finding X, Petition, App. p. 14) and that he later reaped an immense personal profit as a result of the fraudulent acquisition of those shares. (Finding XII, Petition, App. pp. 15-16.) The trial court also found, however, that Ives' misrepresentations as to the sale of producing properties were made without solicitation by Black and without Black's knowledge (Finding VII, Petition, App. p. 10) and that the value of the respondents' shares when purchased in 1944 and 1945 was not greater than the price which respondents received. (Finding XIII, Petition, App. p. 16.) Its denial of any recovery was based on those latter findings and on the Conclusions of Law that Ives was not Black's agent (Conclusion of Law VI, Petition, App. p. 18), that there was no conspiracy between Black and Ives (Conclusion of Law V, Petition, App. p. 17), that Black

[7] Petitioners' emphasis on the "careful detail" in which the trial court set forth its findings of fact (Petition, p. 23) must be considered in the light of the fact that the trial court adopted petitioners' suggested findings of fact verbatim, including the record references. (Compare R. 77-93 with R. 115-132.) It should also be noted that the "detailed references to the testimony" (Petition, p. 27) were in the form "D. . ." rather than "Tr. . ." (R. 115-32). Those references were to a narrative digest of the testimony submitted by petitioners' attorneys in the trial court and objected to as inaccurate by respondents. That narrative summary is not in the printed record. When petitioners state, in connection with the trial court's Findings of Fact and Conclusions of Law as printed in the Appendix to the Petition, that "record references have been changed to correspond with the printed record" they necessarily mean that references to the narrative digest of the testimony have been converted into references to the actual testimony in the printed record. The references printed in the Appendix are not, therefore, the trial court's actual references.

was not guilty of any fraud (Conclusion of Law VII, Petition, App. pp. 18-19) and that the individual respondents suffered no injury from the sale of their stock. (Conclusion of Law VIII, Petition, App. p. 18.) The court also concluded, without further explanation, that the derivative claims should be dismissed. (Conclusion of Law XI, Petition, App. p. 18.)

The Court of Appeals first held the defrauded respondents to be entitled to participate in a proportionate redistribution of the proceeds of the 1947 sale in Black's hands. It based this holding on three conclusions: (1) that Ives was Black's agent when he purchased the shares and Black was responsible as principal for Ives' misrepresentations even if he neither solicited them or knew of them when they were made; (2) that when Black learned of the misrepresentations by which the shares were acquired, as the trial court found he had, it became his duty to restore them; (3) that Black stood in a position of trust and confidence with respect to the Aledo group to which he was unfaithful. Judge Phillips concurred in the first of these three independent and legally sufficient conclusions, expressing no opinion on the others.

The Court of Appeals concluded, in addition, that since 32,457.50 of the shares sold by Black in 1947 for $51.06 per share had "beyond doubt" originally been issued to him "surreptitiously, covertly, and * * * fraudulently" they were not validly issued shares. In its first opinion it assumed that the corporation's receivers would participate on the basis of these shares in the proportionate distribution of the proceeds of the 1947 sale. When petitioners called the court's attention to the fact that this recovery by the receivers might produce an unjustified return of consideration to N. C. R. A., the court modified its opinion to hold that the invalid shares should not participate at all in the distribution of the proceeds of the 1947 sale.

Faced with that record, counsel for petitioners take the responsibility of imputing bad faith to the Court of Appeals in holding that the proceeds of the 1947 sale in Black's hands should be re-distributed among Black and the defrauded respondents on the basis of their respective holdings of validly issued shares.

ARGUMENT.

I.

PETITIONERS' JURISDICTIONAL POINT INVOLVES NO CONFLICT AND IS WITHOUT MERIT.

Petitioners' jurisdictional point has at most a very limited application in this case. They do not contend that the court lacked jurisdiction of the action or of the claims of the original parties but only that the court erred in allowing additional members of the class of defrauded stockholders to intervene without requiring each to meet the requirements for diversity jurisdiction with respect to his claim. Nor do they contend that any of the interveners failed to meet the requirement as to jurisdictional amount. They claim only that the citizenship of the interveners is in "considerable confusion" and assert the necessity of a remand of the case for a "determination of fact regarding citizenship." (Petition, pp. 18-19.) Their claim of confusion as to citizenship is, however, based on reference solely to the pleadings. (Petition, p. 18.) The testimony establishes clearly that only two of the numerous intervening respondents have a common citizenship with petitioners. These are Mr. and Mrs. Constant who, although originally members of the Aledo, Illinois, group of defrauded stockholders, later, like petitioners, moved to California. The testimony clearly negates such common citizenship as to all the other defrauded interveners and establishes the Illinois citizenship of most of them.[8]

[8] In connection with this proof of Illinois citizenship, petitioners refer to the fact that the Black-Marshall Oil Company is an Illinois corporation. They concede that it is not a party but suggest that it should be a necessary party defendant. They make no attempt, however, to deal with the fact that it was represented by receivers, appointed by the Federal District Court for the Southern District

(R. 450, 465, 532, 543, 278-79, 587, 264, 322, 517-18, 504, 360, 415, 921, 936.) Thus on the record the jurisdictional point that petitioners raise affects only the claims of Mr. and Mrs. Constant, two intervenors holding a total of 1,850 shares out of a total of 40,748 shares held by all respondents.

This point, on which petitioners now "paramountly" rely in this Court as a reason for granting the writ, was not raised by them at any stage of the proceedings below. As petitioners state, this does not preclude their suggesting it to this Court. It does, however, reveal the point to be the product of a last minute quest for a more colorable reason for praying certiorari than was provided by questions of state law decided against them below and now embodied in their second point. Its relative unimportance in this case suggests that it is now of concern to petitioners only as a tenuous device for obtaining the review of the evidence and of questions of state law presented by their second point.

No Conflict Exists on the Jurisdictional Question.

With respect to their jurisdictional point, petitioners claim that the decision of the court below conflicts with this Court's decision in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, and the decision of the Court of Appeals for the Second Circuit in *Steele* v. *Guaranty Trust Co.*, 164 F. 2d 387. (Petition, p. 8.) Petitioners' contention overlooks the fact that these cases involved the *separate and distinct* claims of *original* parties, and it was for that reason that, in both cases, each party was required independently to meet the jurisdictional requirements.

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of Illinois, who intervened as plaintiffs in support of the individual and derivative claims. (R. 25-29, 51.) They do not attempt to explain why, if it were a party, it would be aligned as a defendant to defeat jurisdiction although its interest would be that of a plaintiff and it is not under antagonistic control. Nor do they attempt to explain how its citizenship could affect jurisdiction over the individual claims.

Here, on the other hand, the parties in question are interveners, jurisdictional requirements having been fully met by the original parties, and the claims of all members of the class are interdependent. The significance of this distinction is well illustrated by a subsequent decision of the Court of Appeals for the Second Circuit, *Dickinson* v. *Burnham*, 197 F. 2d 973, which petitioners fail to discuss despite the fact that it was one of the decisions relied upon by the court below on this point. (Petition, App. p. 52.)

In the *Dickinson* case, the court dealt with the jurisdictional requirements for *intervention* in a class suit involving *interdependent* claims—the very issue presented by the strikingly similar facts of this case. There, two members of a class of stockholders had brought an action on behalf of the class to seek cancellation of stock on the basis of fraud and recovery of profits fraudulently realized by two individuals.[9] Some 70 additional members of the class subsequently intervened without regard to diversity of citizenship, and after trial a judgment was entered in favor of plaintiffs.

Upon appeal, one of the "procedural" questions presented was the very issue raised here, namely, whether the court had jurisdiction over claims of interveners who did not independently meet diversity of citizenship requirements. The district court had characterized the class action as "spurious." As to the bearing of this characterization on the procedural questions presented, the Court of Appeals said:

> "By making use of this euphonious, if mystic, label, the judge has let himself in for a considerable amount of trouble. For the procedural aspects of this appeal

[9] The action was originally instituted by one Dickinson to impress an equitable lien on certain stock of Petroleum Conversion Corporation, and the two stockholders intervened in that action in behalf of the class. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507.

are made to turn largely upon arguments and deductions drawn from this observation.

"The convenient use of the appellations 'true,' 'hybrid' and 'spurious' for determining the effect of a judgment in a class suit under F. R. 23(a) has become rather general; but these labels should not be pressed so far as to obscure the original meaning and purpose of the rule itself." (197 F. 2d at 978-79.)

Having recognized that the characterization of a suit as "true," "hybrid" or "spurious" is not necessarily determinative even of the effect of the judgment on the rights of absent members of the class, the court concluded that, in any event, the suit was in fact "hybrid." The Court said:

"* * * we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably. * * *

"For what we have here is property held in constructive trust by reason of fraud perpetrated upon those who made the original contributions * * * it is also quite clear, as the Third Circuit has pointed out, that the disposition of a fund held in constructive trust comes within the 'hybrid' class, so that claims by non-appearing members can no longer be asserted against the original holders who are forced by the judgment to disgorge. *Pennsylvania Co. for Insurance, etc.* v. *Deckert*, 3 Cir., 123 F. 2d 979, 985; 3 Moore's Federal Practice 3441, 3468, 2d ed. 1948." (197 F. 2d at 979-80.)

In reaching that conclusion, the Court emphasized the fact that the judgment running to each claimant member of the class had to be calculated according to the following formula:

"A final decree should be entered according to each intervener claimant, * * * a judgment * * * in an amount which shall bear the same ratio to $176,245 and interest * * * as the amount of the intervener's claim bears to the total of the claims of the interveners allowed by the Court." (197 F. 2d at 978.)

Because of this interdependence of the several claims against the fund held in constructive trust, all the claims had to be tried in order to make possible a final settlement of any claim. The claims were not, therefore, separate and distinct.

Having so decided, the Court of Appeals then turned to the question of jurisdiction, saying:

> "The court found the diverse citizenship of the original parties and the interveners Burnham and Vaughan. This is sufficient for our purposes. *Townsend* v. *Bucyrus-Erie Co.*, 10 Cir., 144 F. 2d 106, 108. And it gave jurisdiction for adjudication of the issues between the class and the plaintiff and his co-conspirator, irrespective of citizenship of the subsequent interveners; the later distribution of the fund was merely an ancillary step in administration. 3 Moore's Federal Practice 3443, 2 Ed. 1948; Clark, Code Pleading 406, 2d Ed. 1947." (197 F. 2d at 980.)

The *Dickinson* case and the instant action present many similarities, the most significant of which is that both involve intervention by members of a class whose claims are not in fact separate and distinct but are interdependent. The judgment to which each member of the class is entitled in the present case is described by the court below as follows:

> "To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N. C. R. A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

> "Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (Petition, App. pp. 68-69.)

Thus, the amount of the judgment to which each member of the class is entitled depends on the total number of shares entitled to participate in the proceeds of the 1947 sale, held in constructive trust by Black. Because of this fact, the final disposition of the claim of any member of the class depends on the disposition made of the claims of the other members of the class. The situation in this respect is precisely the same here as in the *Dickinson* case.

Faced with intervention in a class suit involving claims not in fact separate and distinct, but interdependent, the court below and the Court of Appeals for the Second Circuit both treat the interventions as ancillary and do not require each intervener independently to meet the requirements for diversity jurisdiction with respect to his claim. With respect to the facts here presented, therefore, there is no conflict of decision. Indeed, there is a consistent decision of the very court as to which a conflict is asserted.

Both Courts were clearly correct. In the present case, as in the *Dickinson* case, allowing the other members of the class to intervene without requiring each independently to meet the requirements for diversity jurisdiction was necessary in order that the court might dispose of the claims already before it, against a fund held in constructive trust, completely, effectively and equitably. In

these circumstances the jurisdiction over the original claims fully supported the ancillary interventions. *Stewart* v. *Dunham*, 115 U. S. 61.

Petitioners' Argument Has No Bearing on the Jurisdictional Question.

Disregarding the *Dickinson* case and the equivalent facts of the present case, petitioners have devoted their argument to a narrow question which, although the subject of considerable academic debate, has had no practical importance in the nearly twenty years since the adoption of the Federal Rules. That question is whether, in the words of Professor Moore, "no independent jurisdictional ground is needed to support intervention in a class action, *even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved.*" (Petition, p. 15.) Petitioners contend that Professor Moore is wrong and, in effect, ask this Court to take this case in order to correct him. But they cannot properly raise that abstract question in this case. That question could be raised only in a case in which the only basis for a class action was the existence of common questions of law or fact in otherwise separate and distinct claims. Here, however, the claims, though several, are not separate and distinct, but are interdependent. One cannot be finally disposed of without at the same time passing upon the others, since the recovery upon each share of stock necessarily depends upon the total number of shares entitled to participate in the proceeds of the fraud.

The most that petitioners' argument establishes is that some class suits within Rule 23(a)(3) may involve such separate and distinct claims that to permit members of the class to intervene without independently meeting the

requirements for diversity jurisdiction would unduly extend federal jurisdiction. Petitioners certainly err, however, in assuming that if an independent jurisdictional ground is required to support intervention in some class actions within Rule 23(a)(3), it must be required in every such action.

This ascribes a jurisdictional significance to the provisions of Rule 23(a) which they clearly were not intended to have. By the express provision of Rule 82, whether a class suit is "true," "hybrid" or "spurious" under Rule 23(a) cannot change the jurisdictional requirements for intervention. The question in each case, once the federal court has acquired jurisdiction, is whether it is appropriate under the particular circumstances to allow ancillary intervention by other members of the class. This is strikingly illustrated by the fact, as observed by Professor Chafee, that *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, the leading case upholding ancillary intervention of non-diverse members of a class, was probably a "spurious" class action if judged by the classification of rights set forth in Rule 23(a).[10]

Petitioners quote Judge Prettyman's opinion in *Knowles* v. *War Damage Corp.*, Petition, pp. 11-12, to the effect that the several claims involved in a "spurious" class suit "*may* be several and *not* interdependent." However, as this statement implies, they may also be interdependent, though several. If a particular action, as is true here, involves claims that are interdependent and is therefore within the principle of ancillary intervention, the fact that some class actions under Rule 23(a)(3) may involve separate and distinct claims not within that principle is immaterial.[11]

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[10] Chafee, *Some Problems of Equity* 254, 255-56 (1950).

[11] The wisdom of not attaching jurisdictional significance to the classification of rights in Rule 23(a) is confirmed by the uncer-

The jurisdictional question argued by petitioners thus is simply not presented by the facts of this case.

The District Court decided to deal with a controversy over which it clearly had jurisdiction completely and as a whole. The court did so by including among the interventions which it allowed those of two former residents of Aledo, Illinois, the principal place of petitioners' operations, even though they had since moved to California. The Court of Appeals correctly upheld that action. Since the claims of all of the class who desired to intervene against petitioners were interdependent the court could not have done complete justice even to the original plaintiffs and the other interveners unless it had permitted their intervention. Nor would it have made any sense for the court to have required that Mr. and Mrs. Constant and the State of California suffer the burden and expense of duplicating the case in the courts of that State. There it would have been necessary to establish not only the Constants' individual claims but also the facts as to the entire fraud, just as respondents did below. Even then the California court could not finally have disposed of the Constants' claims because of their interdependence as to amount with the claims of the other defrauded stockholders in the federal court.

The jurisdictional question argued by petitioners not being relevant here, the statement of the Court of Appeals for the Second Circuit in the *Dickinson* case applies equally here: "Obviously complete settlement of this long pending dispute was desirable and in the interest of justice." (197 F. 2d at 980.)

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tainty which exists under the present Rule as to whether a given class action is "true," "hybrid" or "spurious," and as to the substantive consequences of holding it to be one type or another.

II.

THE DECISION OF THE COURT OF APPEALS IS BASED UPON ITS SOUND CONCLUSIONS OF LAW ON UNDISTURBED FINDINGS AND UNDISPUTED FACTS.

Petitioners contend that the Court of Appeals disregarded the requirement of Rule 52(a) of the Federal Rules of Civil Procedure that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses * * *." In support of this contention they refer to a number of cases under Rule 52(a) and assert generally, at the beginning and end of their argument, that the Court of Appeals wrongfully set aside the trial court's findings on key questions of fact involving conflicting testimony by Black and Ives. (Petition, pp. 21, 32-33.) Their argument is devoted for the most part, however, not to this point but to the unrelated contention that various conclusions of law reached by the Court of Appeals on the basis of undisturbed findings and undisputed facts were erroneous. These conclusions of law constitute the real basis of the Court of Appeals decision and the asserted errors therein can be the only real basis of the petition.

This becomes very clear when petitioners' various contentions as to law and fact are considered in relation to the ultimate conclusions on which the Court of Appeals decision is based. These are, first, that petitioner Black is liable to account to the defrauded respondents for the proceeds of the 1947 sale of Black-Marshall and, second, that 32,457.50 of the shares claimed by Black were invalid when issued and not, therefore, entitled to participate in the distribution of those proceeds. Both these conclusions are supported by undisturbed findings and undisputed facts and neither depends on setting aside any findings of fact.

The holding of the Court of Appeals that Black must account to the defrauded respondents for the proceeds of the 1947 sale does not depend on the setting aside of any of the trial court's findings of fact but is, on the contrary, fully supported by the trial court's findings that Ives induced the sale of the stock by misrepresentation and delivered it to Black, that Black learned of the misrepresentation but did nothing, and that he subsequently dealt with it in such a way as to realize an immense personal profit.

The principal basis of this holding is the conclusion of law that Ives' misrepresentations are imputable to Black on elementary principles of agency. This was the Court's unanimous conclusion.

In reaching that conclusion, the Court fully recognized the limitations imposed by Rule 52(a). The majority opinion stated:

> "We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. *United States* v. *United States Gypsum*, 333 U. S. 364; *United States* v. *Waymire*, 10 Cir., 202 F. 2d 550; *McAllister* v. *United States*, 348 U. S. 19; *United States* v. *Oregon Medical Society*, 343 U. S. 326." (Petition, App. p. 53.)

The conclusion of the majority of the Court on this question was then stated as follows:

> "It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his

agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, 'although the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment.' 2 Am. Jur., Agency §363; see also Restatement Agency § 261; *Anheuser-Busch* v. *Grovier-Starr Produce Co.*, 128 F. 2d 146; *Cox* v. *Pabst Brewing Co.*, 128 F. 2d 468; *Siedhoff* v. *Campbell*, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, 'if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized.' 2 Am. Jur., Agency § 362; see also Restatement Agency, Sections 257, 258." (Petition, App. pp. 58-59.)

This conclusion was fully concurred in by Judge Phillips, as follows:

"That Ives made the alleged false representations with respect to the sale of the assets of the B-M Company to members of the Aledo Group is conceded. The trial court found that such representations were made by Ives without solicitation by William H. Black and without the knowledge of William H. Black. However, Black testified that he told the Aledo Group that Ives was his agent in all matters with respect to the B-M Company, and especially for the purpose of furnishing information to the Aledo Group. Therefore, it is my opinion that Black was estopped to deny Ives' agency and that Ives had apparent or ostensible authority to furnish information on Black's behalf

to the Aledo Group with respect to the B-M Company and that the representations made by Ives to the Aledo Group were within the scope of the apparent or ostensible authority of Ives and Black was bound thereby. On that ground and that ground alone, I concur in the majority opinion, insofar as it reversed the judgment below, with respect to the claim of the Aledo Group to recover from William H. Black for the injuries suffered by the Aledo Group on account of the alleged false and fraudulent representations of Ives." (Petition, App. pp. 72-73.)

The Court of Appeals thus unanimously reversed the trial court's Conclusion of Law that: "The evidence does not establish that Mr. Ives was the agent of Mr. Black." (Conclusion of Law VI, Petition, App. p. 18.)

Petitioners do not now dispute the correctness of that dispositive action of the Court of Appeals. They likewise disregard a complementary conclusion of the Court of Appeals, which was as follows:

"Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black. In their brief the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, 'he ratifies who does not restore.' *Maryland Casualty Co.* v. *Beebe*, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account." (Petition, App. pp. 59-60.)

This conclusion rests on facts found by the trial court (Petition, App. p. 14) and is clearly correct as a matter of law.

Having ignored these sufficient bases for the reversal on this point, petitioners complain only of the Court's further statement that the stock was obtained "in consummation of what we hold to be Black's scheme to defraud." (Petition, App. p. 62.) They complain (Petition, pp. 23-25) that this statement conflicts with the trial court's conclusions of law that Black was not guilty of any fraud or conspiracy to defraud and its findings that: "These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge." (Findings VII, VIII, Petition, App. pp. 10, 13.) Even if these conclusions and findings were not clearly erroneous, the statement of the Court of Appeals, after it had determined Ives' misrepresentations to be imputable to Black as a matter of law on principles of agency, would not provide an occasion for exercise of this Court's jurisdiction. As indicated by Judge Phillips' opinion it was not necessary to determine whether Black or Ives or both together conceived the scheme to defraud. It was enough that their cooperative action had in fact defrauded the Aledo group of their shares and that Black profited immensely thereby. Black's duty to account for his profits does not depend on his personal guilt nor is Black's obligation reduced if Ives is assumed also to have profited. The question of conspiracy is entirely immaterial. (*Cf.* Petition, pp. 7-8, 20-21.)

Petitioners' principal argument bearing on Black's liability to account concerns a question of Illinois law. They contend that respondents' receipt of "the full value of their stock" in 1944 and 1945 requires a holding, under Illinois law, that they were not damaged by the misrepresentations by which they were induced to sell it. What petitioners thus assert is, in substance,

that Black is entitled to a presumption that the respondents' shares could have been acquired in 1944 and 1945 at $10 and $12 per share without the misrepresentations.[12] The Illinois cases cited by petitioners support no such unsound proposition.[13] The Court's cases support its holding.

With respect to the Court of Appeals' conclusion that 32,457.50 of the shares claimed by Black are invalid promotional stock and therefore not entitled to participate in a proportionate distribution of the proceeds of the 1947 sale, petitioners also rely primarily on a question of state law. They contend that the Court thus erroneously allowed the individual respondents to recover directly on a cause of action derived from the corporation and "whose fruits could lawfully accrue only to the corporation." (Petition, pp. 28-32.) They contend, in effect, that the corporation's receivers should share in the proceeds of the 1947 sale on the basis of the 32,457.50 invalidly issued shares, although they admit that this would "require petitioner to pay back the proceeds of the sale for the benefit, in large part, of the purchaser of the shares and majority shareholder, N. C. R. A." (Petition, p. 30.) It was, in fact, petitioners' objection to such an unjust enrichment of N. C. R. A. which led the Court of Appeals to modify its opinion to deny the receivers' claim. Having thus induced the Court of Appeals to deny a corporate recovery on the invalid shares, petitioners now seek to

[12] Black could have established whether that was true as to the 1945 sales by making full disclosure and an offer to restore petitioners' stock after, as the trial court found, he learned of Ives' misrepresentations in 1945 when he still had control over their shares.

[13] One of the cases cited actually upholds a complaint, for cancellation of a deed to real estate, in which it was not alleged that the price paid was less than the market value but only that the use to which the buyer intended to put the property had been misrepresented. *Roda* v. *Berko*, 401 Ill. 335, 81 N. E. 2d 912 (1948).

eliminate the equitable alternative remedy adopted by the Court.

Assuming the correctness of petitioners' basic proposition as to the nature of the alternative remedy adopted by the Court of Appeals,[14] they clearly err in characterizing its holding as "wholly original." (Petition, p. 29.) In so doing, they simply disregard a large body of authority authorizing individual recovery when a corporation has been dissolved and liquidated or when a corporate recovery would produce an inequitable result. The Court of Appeals referred to *Home Fire Ins. Co.* v. *Barber*, 67 Neb. 644, 93 N. W. 1024 (1903). Other cases which it might also have cited are: *Ervin* v. *Oregon Ry. & Nav. Co.*, 20 Fed. 577, 581 (C. C. S. D. N. Y., 1884); *Backus* v. *Finkelstein*, 23 F. 2d 357, 366 (D. Minn., 1927); *Lebold* v. *Inland Steel Co.*, 125 F. 2d 369 (7 Cir., 1942); *Gardiner* v. *Automatic Arms Co.*, 275 Fed. 697 (N. D. N. Y., 1921); *Brown* v. *De Young*, 167 Ill. 549, 47 N. E. 863 (1897); *Snyder* v. *Aetna Construction Co.*, 272 Ill. App. 591 (1933); *Dunlay* v. *Avenue M. Garage & Repair Co.*, 253 N. Y. 274, 170 N. E. 917 (1930); *Sautter* v. *Fulmer*, 258 N. Y. 107, 179 N. E. 310 (1932); *Commonwealth Title Ins. & Trust Co.* v. *Seltzer*, 227 Pa. 410, 76 Atl. 77, 80 (1910); *Porter* v. *Healy*, 244 Pa. 427, 91 Atl. 428, 432 (1914); *Hechelman* v. *Geyer*, 252 Pa. 123, 97 Atl. 193 (1916); *Upton* v. *Southern Produce Co.*, 147 Va. 937, 133 S. E. 576 (1926). These cases establish the correctness of the Court of Appeals' holding on this point.

The basis of the Court of Appeals' holding that the 32,457.50 shares of Black-Marshall stock were invalid was its conclusion that "it is also clear beyond doubt

---

[14] The decision may certainly be construed as ordering a cancellation of the invalid shares in the corporate actions followed by a proportionate distribution of the proceeds of the 1947 sale on the basis of the validly issued shares.

that it was issued surreptitiously, covertly, and we say fraudulently, to Black." (Petition, App. p. 67.) Petitioners imply, without directly stating, that this is inconsistent with the trial court's findings that:

> "• • • a total of 9,055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five Kansas leases • • •" (Finding III, Petition, App. p. 6.)
>
> "Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black *et al.*, for the partnership interest of Black and Marshall in the original five Kansas leases." (Finding VI, Petition, App. p. 7.)

The Court of Appeals' conclusion is not in the least inconsistent with these findings, however. There was no question that the 64.870 shares referred to, which included the 32,457.50 shares in question, were issued to Black and that they were charged on the books of the Company against the Kansas leases, as were all the other shares issued to Black and the members of the Aledo group. Nor was there any question that Marshall, Black and the members of the Aledo group associated with Black all had recognized interests in the Kansas leases. Black lawfully received 10,000 shares of common and 1,000 shares of preferred for his recognized interest as part of the original issue. The Court of Appeals' conclusion is not inconsistent with these facts. It was also undisputed however, that the 64,870 shares were not validly issued when the other original shares were issued (Black so testified, R. 1286, 1287-89) but were subsequently issued under circumstances which Black did not "propose to explain, because I can't explain it." (R. 1292, 1290.) Although Black contended that he was entitled to those shares for his interest in the Kansas leases, he did not claim that he had asked for them or that the other incorporators had ever agreed that

he should have them. Nor did the trial court so find. So far as appeared from Black's own testimony, he simply took them on the basis of his opinion that he was entitled to have them. (R. 1287-92.) The most that petitioners now claim is that they were in fact issued to him and that the other stockholders could have learned from various corporate records that he had taken them. (Petition, p. 27.) In these circumstances, the Court of Appeals' conclusion that the shares were issued surreptitiously, covertly and fraudulently not only does not conflict with the trial court's findings referred to by petitioners but is unassailable on the record.

Their argument thus makes it evident that what petitioners are primarily seeking here is an opportunity to reargue questions of state law on which the Court of Appeals rejected their contentions.

CONCLUSION.

For purposes of this petition, petitioners have stated a much mooted jurisdictional question and a question as to the scope of review of findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure which, whatever their abstract interest, are not presented for decision on the record in this case. The questions really presented and upon which petitioners would necessarily rely for a reversal if certiorari were granted, are questions of state law as to which petitioners do not even claim such importance as to justify their reconsideration by this court. On these questions, moreover, the decision of the Court of Appeals was correct.

For the foregoing reasons, this Petition for Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 13

WILLIAM H. BLACK AND RUTH F. BLACK, *Petitioners*,

vs.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES AND LARRY STITES, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY LOIS L. STITES, THEIR MOTHER AND NEXT FRIEND; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER AND FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, A CORPORATION, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 13.

WILLIAM H. BLACK AND RUTH F. BLACK, *Petitioners*,

vs.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES AND LARRY STITES, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY LOIS L. STITES, THEIR MOTHER AND NEXT FRIEND; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER AND FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, A CORPORATION, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

STATUTE AND RULE INVOLVED.

In addition to the federal statutes and rules cited by petitioners, the following are involved:

Section 10 of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j, provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • • • •
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule X-10B-5 of the Rules of the Securities and Exchange Commission (17 CFR 240.10b-5) provides:

> "*Employment of manipulative and deceptive devices by any purchaser of a security.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud.
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

QUESTIONS PRESENTED.

This Court was induced to grant certiorari upon petitioners' representation that the claims in this case are separate and distinct claims related solely in the sense that there are common questions of law or fact and common relief is sought. Respondents deny that this is the fact. The questions actually presented are:

1. Whether, upon this record, the claims in this case are as represented by petitioners or are, on the contrary, interdependent claims to a fund upon which the court below has impressed a constructive trust.

2. Whether the federal question alleged in the complaint vested the court with jurisdiction irrespective of the citizenship of the parties.

STATEMENT.

Preliminary Statement.

Petitioners' statement contains almost none of the facts necessary to an understanding of the nature of the claims involved in this action and sustained by the Court of Appeals. It is limited to a highly colored statement of some of the procedural incidents of this case. In particular, it omits reference to the facts which demonstrate the interdependence of the claims in this action and the recognition of that interdependence by the court below. It is essential, therefore, that the facts necessary to an understanding of this vital issue be stated.

The Facts.

Petitioner W. H. Black, an oil well promoter, went to Illinois in 1938 to obtain financial support for his activities. In Aledo, Illinois, a small farming community, he met

and enlisted the services of Dale G. Ives, an attorney whose clients and acquaintances included most of the respondents in this case. (R. 199-200.) Through Ives, Black was able to obtain funds from a number of people of the community who put their complete trust in Black "to handle their funds fairly and squarely." (R. 201.) Several of the respondents even executed agreements making Black their agent with authority to act "without interference from any parties of the second part." (CR 1524-5.)[1]

Using funds provided by respondents, Black, after acquiring several unproductive oil leases in Illinois, moved his operations to Kansas, where he joined forces with another promoter, Deering J. Marshall. (R. 202-203.) Ives continued to solicit money from respondents, which he transmitted to Black (R. 199-200, 214-215), and Black used this money to acquire additional leases in Kansas. (R. 222-224.) Thereafter, Black proposed to respondents the formation of Black-Marshall Oil Company (Black-Marshall) to develop the leases he had acquired with their funds. (CR. 639.) Of the stock to be issued by Black-Marshall, Black represented to respondents that he was to receive 11,000 shares or less. (CR. 148, 192-3.) However, after incorporation of Black-Marshall, Black secretly procured the issuance of 64,870 shares to himself in addition to the 11,000 to which he was entitled. (CR. 1557-61, 1569.) Black turned over approximately half of these shares to Marshall and kept the other half—32,457½ shares. When Black was asked on cross examination to explain the issuance of these 64,870 shares, he simply stated: "I don't propose to explain because I can't explain it, sir." (R. 241.)

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[1] References to the printed record in this Court are designated "(R. . .)," while references to the Certified Record filed with the Clerk of this Court but not included in the printed record are designated "(CR. . .)." Emphasis is supplied throughout.

At the incorporation meeting of Black-Marshall, Black told respondents that Ives would continue, as in the past, to act as Black's representative in his dealings with the Aledo group. (CR. 244-5.) Black was elected president and chairman of the board of the directors, the finance committee and the executive committee of Black-Marshall, while Ives was elected secretary-treasurer and director. (CR. 1721-2.) Both held these positions continuously until 1947, when the company was dissolved. Black repeatedly assured respondents that Ives would act as his representative in all Black-Marshall matters. (R. 175; CR. 152-3, 158, 197.)

In June of 1944, Ives told respondents that Black had called him and directed him to tell respondents that the producing properties of Black-Marshall had been sold; that it was necessary for them to send in one-half of their stock to bind the deal; and that the sale price would net about $10 per share. (CR. 679-82, 758-30.) These statements were wholly false. On the basis of the misrepresentations, respondents delivered to Ives the first one-half of their stock (CR. 159-162, 201-202), and Black dispatched the company airplane to bring Ives and the stock to Kansas.[2]

In August of 1945, Black undertook to procure the remaining shares held by respondents. To accomplish this objective, Ives told respondents that the producing property of Black-Marshall had been sold to yield $12 per share on the remaining stock and that Black had instructed him to get in the balance of their stock. (CR. 687.) Spencer Berglund, who had lived in Aledo but later moved

[2] 11,714 of the shares were paid for with Company funds, charged as an advance to Black. (R. 284; CR. 1540-42.) Funds to pay for the balance were raised by a temporary resale of 25,000 shares by Black to some of his associates, most of these shares being reacquired by Black by payment of $17.50 per share of Company funds in the fall of 1945. (R. 390-91, 393-94, 399-402.)

to Florida, received these instructions from Ives by wire dated August 29, 1945:

> "Sold producing property Black-Marshall Oil Company twelve dollars share, kept all Landowners Royalty Company. Sign stock in blank, forward Fourth National Bank, Wichita, Kansas, care Arthur Kincade, immediately. Must be closed September first." (Ex. 81, CR. 1538.)

The statements regarding the sale of the producing properties of Black-Marshall were false. In response to these misrepresentations, respondents turned in the remainder of their stock to Ives, who transmitted it to Black. Shortly thereafter, Ives advised Black that he had forwarded "the balance of the outstanding stock in this community." (CR. 1539-40.) Black paid for this stock entirely with Black-Marshall funds, which were charged as an advance to Black on the Company's books. In all, Black advanced $831,483.06 of Black-Marshall funds to himself to pay for the acquisition of its stock.

By late summer of 1945, Black had succeeded in obtaining all of respondents' stock. About a month later, however, respondent Wadleigh wrote to Black asking for further details about the sale of Black-Marshall. (R. 302.) Black immediately called Ives and asked what reply should be made to Dr. Wadleigh. (CR. 694-5.) Ives replied to Black as follows:

> "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing * * *." (R. 303.)

Thus, whatever Black's instructions to Ives regarding the representations to be made to respondents, within a

month after he had acquired their stock Black was expressly informed by Ives of the fraudulent statements that had been made on his behalf. At that time Black had in his possession, indorsed in blank, practically all of the stock which had been secured from respondents, including that temporarily transferred to his associates in 1944. (R. 313-14.) Notwithstanding his admitted knowledge that this stock had been acquired by the fraud and misrepresentation of his agent, Ives, Black did absolutely nothing to repudiate Ives' misrepresentations or to return the stock to respondents. His reason: "I thought it was too late to do anything." (R. 304. See R. 303-5, 313.)[3]

Having obtained all of respondents' stock, Black then turned his attention to the matter of realizing the profits made possible by these fraudulent transactions. This led, in 1947, to a sale of Black-Marshall to National Cooperative Refinery Association (N. C. R. A.). Preliminary to and in preparation for the sale, Black caused the 11,714 shares acquired from respondents with Company funds in 1944 to be transferred to himself. (R. 327-9.) The stock purchased by Black in 1945 and thereafter held in his lock box, numbering approximately 56,000 shares, was marked "retired" for the purpose of cancelling the advances made by the Company to purchase the stock, thus balancing Black's account with the Company. Since Black at that time held a preponderant majority of the stock in his own name, this purported retirement had substantially the same effect as a direct transfer of the stock to Black. (R. 186-88, 314-15; CR. 1098-99.)

Black then transferred all of his shares, numbering 62,126, to N. C. R. A. for $51.06 per share (R. 388-9), and

[3] Black also received a letter of inquiry from respondent Kenneth D. Constant. Black replied that it would be impossible "to make clear to you the many ramifications of our recent deal" but that he would explain it in person. (R. 342.) Black never did so because he "didn't have time to see them." (R. 345.)

the few stockholders who had retained their shares received the same price per share. (R. 406; CR. 1134-35.) Of a total consideration of $4,420,634.38 paid by N. C. R. A. for Black-Marshall, Black received $3,172,153.56 personally, while members of his family received an additional $347,414.79. (R. 406.) Black then left Kansas to reside in California.

The Legal Actions.

Although Black had been able to sidestep Dr. Wadleigh's inquiry in 1945, respondents, in the spring of 1949, discovered the manner in which they had been victimized. Shortly thereafter Dr. Amen, a citizen of South Dakota, brought suit again petitioners and certain co-defendants in the United States District Court for the District of Kansas. Dr. Amen and five other respondents, some of whom were citizens of Illinois, also brought suit against petitioners and others in a Kansas State court. In both cases Black-Marshall, which was a dissolved Illinois corporation, and other citizens of Illinois were named as defendants. However, petitioners themselves sought and obtained the removal of the state court action to the federal court, alleging that the named defendants who were citizens of Illinois had not been and could not be served, so that the action was wholly one between citizens of different states. (R. 39.)[4]

Prior to trial, all defendants other than petitioners, who are citizens of California, were dismised from the action.[5] Meanwhile, a number of other former stockholders of

[4] Petitioners now refer to their own action in removing the state court suit, which respondents opposed, as "palpable error." (Pet. Br. 6.)

[5] Respondent Amen obtained an order of an Illinois court setting aside the dissolution of Black-Marshall and appointing co-receivers of the company. These co-receivers subsequently brought another action against petitioners and also obtained leave to intervene, as parties plaintiff in the original federal court case brought by Dr. Amen and to dismiss Black-Marshall as a defendant therein. (R. 25-26.)

Black-Marshall whose stock had been acquired by Black filed intervening petitions, which were allowed. The citizenship of the interveners was not alleged or formally proved, but the record leaves no real doubt that diversity exists between petitioners and all the interveners except Mr. and Mrs. Kenneth Constant, who had also moved to California. (R. 137-47.)

In addition to alleging diversity of citizenship, respondents averred that the action arises under the Constitution and laws of the United States. (R. 13.) This allegation was founded upon the claim that petitioners' actions, in addition to constituting common law fraud, violated Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and Rule X-10B-5 of the Securities and Exchange Commission promulgated thereunder. That Rule, which is paraphrased in respondents' pleading (R. 15), makes it unlawful, in connection with the purchase of securities, to use the United States mails or other instrumentalities of interstate commerce to employ schemes to defraud, to make untrue statements of material facts, or to engage in acts or practices which operate as a fraud upon the seller of securities.

Following a trial to the court, the trial judge rendered judgment for the defendants. The court's findings of fact (which adopted petitioners' suggested findings verbatim) recognized that respondents' stock had been acquired by Ives' fraud and had been delivered to Black (R. 124-30); that Black was fully aware of the fact that the shares had been acquired by gross misrepresentations but did nothing to rectify the fraud (R. 130); and that he had reaped an immense personal profit as a result of the fraudulent acquisition of respondents' shares. (R. 131-2.)

The trial court's denial of recovery was based principally upon the finding of fact that Ives' misrepresentations had

been made without Black's solicitation or knowledge (R. 124-7),[6] and upon the conclusion of law that Ives was not Black's agent. (R. 134.) The trial court dismissed the claims based upon Black's fraudulent issuance to himself of 32,457½ shares without explanation. (R. 135.)

The Court of Appeals reversed. It held, upon principles of unjust enrichment, that respondents were entitled to participate in the proceeds of the 1947 sale of Black-Marshall, and that Black's unlawful profits from the sale must be constituted a trust fund in Black's hands as trustee *ex malificio*. The court's conclusions rested upon three grounds: (1) that Ives was Black's agent when he secured respondents' shares and Black was therefore accountable as principal for Ives' fraud; (2) that when Black learned of the misrepresentations by which respondents' shares, then in his hands, had been acquired, it was his duty to restore them; and (3) that Black stood in a position of trust and confidence to respondents, to which he had been unfaithful.

The Court of Appeals concluded, in addition, that since 32,457½ of the shares sold by Black in 1947 had "beyond doubt" originally been issued to him "surreptitiously, covertly and * * * fraudulently," they were not validly issued shares. In its first opinion it assumed that the corporation's receivers would participate on the basis of those shares in the proportionate distribution of the proceeds of the 1947 sale. When the court was advised that this recovery by the receivers might produce an unjustified return of consideration to National Cooperative Refinery Association, the purchaser of Black-Marshall, the court modified its opinion to hold that the invalid shares should not participate at all in the distribution of the proceeds of the 1947 sale.

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[6] This finding seems almost incredible on the record, but in view of the court's other errors it was unnecessary for the Court of Appeals to determine whether this finding should be set aside.

The Court of Appeals remanded the cause to the District Court for distribution of Black's fraudulent profits among the claimants entitled thereto on the basis of their proportionate interests in the proceeds of the 1947 sale as determined in accordance with a formula set forth in the court's opinion. (R. 460.) As will be shown below (*infra*, pp. 22-29) the amount of money to which each claimant is entitled under the formula depends upon the total number of shares entitled to participate in the proceeds of the 1947 sale. And this, in turn, depends upon the number of claimants who are held to have been defrauded of their shares in 1944 and 1945. The claims here involved are thus not separate and distinct claims related solely by common questions of law or fact but are interdependent claims to a common trust fund.

SUMMARY OF ARGUMENT.

I.

Petitioners represented to this Court upon petition for certiorari that this litigation involves a number of separate and distinct claims related solely in the sense that there are common questions of law or fact involved and common relief was sought. They represented specifically that the Court of Appeals had ordered judgment to be entered in accordance with "a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants." Upon the basis of those representations, this Court granted certiorari to consider whether persons asserting claims of that kind may intervene in a federal court action without regard to the citizenship of each intervener.

The question petitioners asked this Court to review is not presented in this case, and respondents take no position with respect thereto. The claims here involv. are not in fact separate and distinct claims related solely by common questions of law and fact but are interrelated and interdependent claims to a fund upon which the court below has impressed a constructive trust. That court prescribed a formula for distribution of the trust fund under which the amount each claimant is entitled to receive depends upon the number of claimants whose claims are sustained. Because of this interdependence, full and complete justice cannot be done unless all claims to participate in the fund are adjudicated in one proceeding.

Petitioners have acknowledged that in cases where the claims are in fact interdependent, persons asserting such claims may intervene without separately establishing diversity of citizenship. They have specifically recognized the soundness of the decision of the Court of Appeals for

the Second Circuit in *Dickinson* v. *Burnham*, 197 F. 2d 973, which so holds.

The question actually presented is thus not essentially one of law but of fact. That question is whether, on the record and under the decision below in this case, the claims involved are entirely separate and distinct claims related solely by common questions of law and fact, as petitioners represented to this Court, or are in fact interdependent claims to the trust fund held by petitioner as trustee *ex malificio*.

On that question, there can be no doubt. The amount per share to which each claimant is entitled depends directly upon the total number of shares held to be entitled to participate in the proceeds of the sale, which depends in turn upon the number of persons whose claims to have been defrauded by petitioners are sustained by the court. A further element of interdependence arises from the fact that Black's unjust enrichment is insufficient to yield each claimant the full amount to which he is entitled, with the result that there must be a pro-rata adjustment of claims.

II.

The holding in *Dickinson* v. *Burnham* that persons asserting interdependent claims to a fund held in constructive trust may intervene without regard to diversity of citizenship or jurisdictional amount in an action properly brought in a federal court is merely an application of long-established principles of ancillary jurisdiction. In such cases as *Stewart* v. *Dunham*, 115 U. S. 61, this Court has recognized that once federal diversity jurisdiction is properly established, the intervention of other claimants having interdependent claims is ancillary to the main cause, and the citizenship of the interveners is irrelevant.

Petitioners fall into error when they assume that the jurisdictional question here presented depends upon whether the case falls within the first, second or third subdivision of Federal Rule 23(a). The jurisdiction of the federal courts depends upon principles that long antedate the Rules. Moreover, on its actual facts this case falls within Rule 23(a)(2), the "hybrid" class category, as the *Dickinson* case holds.

III.

Quite apart from diversity of citizenship, the jurisdiction of the federal court in this case is founded upon the existence of a federal question. Respondents alleged that petitioners' actions, while constituting common law fraud cognizable under state law, also violated Rule X-10B-5 of the Securities and Exchange Commission, which makes it unlawful, in connection with the purchase of securities, to engage in acts which operate as a fraud upon the seller or to make untrue statements of material facts.

It is well established that a private cause of action may be brought under Rule X-10B-5, and that the anti-fraud provisions of the Rule adopt as the federal standard the most liberal common law views as to what constitutes fraud in the purchase or sale of securities. Since a substantial federal cause of action was alleged, there was pendent jurisdiction over the equivalent common law cause of action. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175.

IV.

Petitioners' reargument of substantive questions which were foreclosed by this Court's limitation of the grant of certiorari is improper. Similarly, petitioners' repeated references to "confusion" and "procedural muddle" constitute an obvious pretext for obtaining a broad remand of this case to the District Court, where they hope once

more to renew the substantive arguments which were resolved against them in the Court of Appeals.

Diversity of citizenship exists as to all parties except Mr. and Mrs. Constant. It is conceded that, even apart from the existence of federal question jurisdiction, the Constants' intervention was proper if the claims are interdependent, as the facts prove them to be. It is only on the asserted ground that the Constants' claim is "separate and distinct" from all others that their intervention is attacked. Even if the Constants' claim were to be eliminated from the case on the ground that it is "separate and distinct," by the same token their absence should not deprive all other respondents of their rightful portion of petitioners' fraudulent profits.

ARGUMENT.

I.

THE QUESTION UPON WHICH PETITIONERS SOUGHT CERTIORARI IS NOT PRESENT UPON THE FACTS IN THIS CASE; PETITIONERS HAVE CONCEDED THE APPLICABLE PRINCIPLES OF LAW.

In their petition for certiorari, petitioners represented to this Court that the following jurisdictional question expresses the circumstances of this case:

> "'* * * whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervenor or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship."

This Court was persuaded to grant the writ upon the basis of that representation. 352 U. S. 888.

Having obtained certiorari upon the question thus stated, petitioners make no effort to justify their representation as to the facts of this case. Instead they embark directly upon a debate with Professor James William Moore over his position that members of the class may be permitted to intervene in a class action under Rule 23(a)(3) without establishing independent jurisdictional grounds "even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved." 4 Moore's *Federal Practice* (2nd Ed.) 137. Petitioners argue that to permit intervention without re-

gard to citizenship in an action which "presents only a series of separate and distinct claims related *solely* in the sense that there is a common question of law or fact involved" (Pet. Br. 23-24) would effect an unwarranted extension of federal jurisdiction by means of a procedural rule.

Petitioners do not fully disclose or meet Professor Moore's countervailing arguments.[7] However, it is unnecessary for respondents to take any position with respect to this question because, as we shall show, this action is *not* one involving "separate and distinct claims related solely in the sense that there is a common question of law or fact involved." On the contrary, this action actually involves interrelated and interdependent claims to a common fund. With respect to a case of that kind, petitioners concede the propriety, under prior decisions of this Court, of permitting the intervention of multiple claimants without requiring each independently to establish jurisdictional grounds. Indeed, respondents submit that this case is precisely analogous in all matters here material to *Dickinson* v. *Burnham*, 197 F. 2d 973 (2nd Cir.), *cert. den.* 344 U. S. 875, in which the court also permitted intervention without regard to citizenship. In their reply brief on certiorari, petitioners conceded that that decision was correct in view of the interdependent nature of the claims there involved. They omit any discussion of the *Dickinson* case from their present brief despite reliance upon that decision by the court below, and the emphasis it received in the briefs upon the petition for certiorari.

There is thus little real dispute between the parties over the principles of law applicable in this area of federal jurisdiction. Petitioners are committed to the position that if this action involves interdependent claims, as in

[7] The gist of this controversy is briefly stated in an appendix hereto, *infra*, pp. 59-61.

Dickinson v. *Burnham*, the court had jurisdiction to deal with the claims of all intervening claimants irrespective of their citizenship. Thus, the question is not whether interveners having separate and distinct claims related solely by a common question of law or fact must separately satisfy jurisdictional requirements, as petitioners represented to this Court on petition for certiorari, but whether the claims involved in this case are *in fact* of that kind or are, on the contrary, interdependent claims of the kind traditionally decided by federal courts in the exercise of ancillary jurisdiction.

This question depends, of course, upon the facts of record—the type of relief sought and granted, the pleadings, the proof, and an analysis of the decision of the court below. All of these matters petitioners studiously ignore. Instead, they rely solely and expressly upon the fact that the court below stated that this is a "spurious" class suit maintainable under Rule 23(a)(3) as establishing that the claims here involved are "separate and distinct claims related *solely* in the sense that there is a common question of law or fact involved and common relief is sought."

Entirely on this basis petitioners seek to place respondents and the Court of Appeals squarely in Professor Moore's camp; they make him "the architect of respondent's case" (Pet. Br. 18); and assert that the decision below "rests on a theory advanced by Professor Moore." (Pet. Br. 21.) Having by this means introduced into this case a legal controversy between themselves and Professor Moore, petitioners carefully avoid any reference to the facts of the case and argue that question in a total factual vacuum.

When the facts of this case are considered, it becomes apparent that there is much more here than merely common questions of law and fact; there is an interrelation

among claims to a trust fund which must be distributed by a single court. Why, then, did the court below refer to this as a "spurious" class suit?

The statement of the Court of Appeals with respect to the class suit issue was not made in the context of the question raised here; it was made in direct response to a different argument by petitioners, which is completely inconsistent with their present contention. Petitioners contended in the Court of Appeals that the frauds committed against respondents did not justify a class action under Rule 23(a)(3) for the reason, it was claimed, that respondents had not been defrauded by the use of a common communication or through misrepresentations made at a single meeting. Petitioners' jurisdictional argument was that *because* the action was not a proper "spurious" class suit under Rule 23(a)(3), it was necessary for each intervener to show diversity of citizenship.[8] They did not contend, as they do here, that each intervener must individually fulfill federal jurisdictional requirements *even though an action is a proper spurious class suit.* On the contrary they conceded that there was no such requirement in a proper spurious class case, while contending that this was not such an action.[9] At that time, in short, pe-

[8] Petitioners admit in their brief in this Court that that was their argument below (Pet. Br. 16, note 8):

> "In the Court of Appeals, petitioner renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a) (3), and *therefore* each respondent's case 'must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved.'"

[9] Actually, the issue never was deemed important in the Court of Appeals. Petitioners' sole argument on the point consisted of two pages, beginning at page 86, in a brief of 146 pages. Petitioners' statement that their jurisdictional contention was "brushed aside" by the court below (Pet. Br. 9) is thus wholly gratuitous, particularly in view of the fact that their contention below was not the one now urged in this Court.

tioners accepted Professor Moore's opinion with respect to the issue they would now so hotly debate.

To meet petitioners' limited argument that this action did not meet the requirements of a spurious class suit, it was necessary only to show that common questions of law or fact sufficient to satisfy Rule 23(a)(3) were presented. It would have been purely a labor of supererogation to go farther, since petitioners at that time conceded the jurisdiction of the court over all interveners if the action were held to be a spurious class suit. In answer, therefore, respondents confined themselves to pointing to the existence of sufficient common questions of law and fact.

No one suggested to the Court of Appeals that jurisdiction over the interveners was in doubt if this action met the "common question of law or fact" test of Rule 23(a)(3). No one then argued that Professor Moore errs on this point.

As to the contention that the complaint alleged individual frauds involving different statements made at different times and therefore did not come within Rule 23(a)(3), the Court of Appeals held that the misrepresentations were made to effectuate "a scheme to defraud the stockholders of Black-Marshall" (R. 442), and therefore clearly presented sufficient common questions of law or fact to satisfy Rule 23(a)(3) as, of course, they did.[10] Thus, having found common questions of law and fact sufficient to satisfy the requirements of Rule 23(a)(3), the court simply concluded, as Moore stated and *as petitioners then*

[10] The Court of Appeals concluded further that the misrepresentations were made "in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan" (R. 448) and that "the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance". (R. 452.)

conceded, that the interveners need not separately meet federal jurisdictional requirements.

It is evident that to dispose of petitioners' jurisdictional argument in the Court of Appeals it was enough to find the claims involved in this action to be related in the sense of having some questions of law and fact in common. It was not necessary even to consider whether they are related in any other sense as well. The Court of Appeals cannot, therefore, be deemed to have decided that the claims involved in this action are related *solely* in the sense of having questions of law or fact in common. Indeed, its formula for distribution of the trust fund specifically recognizes the interdependence of the claims and makes provision therefor.

In the petition for certiorari, no effort was made to substantiate the contention that the claims of the parties are separate and distinct claims having only some questions of law and fact in common by any discussion and analysis of the facts. In respondents' brief in opposition to that petition it was pointed out that, far from being related solely in that there are common questions of law and fact, the claims in this case are in fact inextricably interdependent, the recovery on each claim depending upon the disposition of every other claim. In their reply brief petitioners again avoided an analysis of the facts, choosing to meet respondents' contention with the bald assertion that the judgments to be entered as a result of the opinion of the Court of Appeals are based on "*a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants.*" (Reply Brief on certiorari, p. 5.) This vital assertion could not have been supported by reference to the record but is directly and indisputably contrary to the record, as we shall show below.

In their brief on the merits, petitioners again make no

attempt to demonstrate the truth of this crucial representation. Indeed, they carefully avoid any discussion of the real nature of the claims in this case or their disposition by the court below. They accomplish this by simply reiterating that the Court of Appeals referred to this as a class action under Rule 23(a)(3), without mentioning that this statement was made in response to the very different argument made by petitioners in that court.

Quite apart from its unfairness to the court below, petitioners' presentation has the effect of diverting this Court's attention from the real nature of the claims here involved and the disposition of the case by the Court of Appeals.[11] We propose to point out now the facts which demonstrate that the claims here involved are interdependent claims to a common trust fund.

A. The Claims Here Involved Are Interdependent Claims to a Common Trust Fund Subject to Court Control.

In their original and amended complaints, respondents prayed, on behalf of all shareholders similarly situated, that they be restored to their rights, titles and interests as shareholders of Black-Marshall; that all such shareholders receive their proper and lawful distributive shares of the purchase price of the property of Black-Marshall transferred to N.C.R.A.; and that:

> "* * * the plaintiff and all other such shareholders be adjudged the equitable owners, as their interests may appear, of all said shares and properties, that the defendants be decreed to hold all such shares and

[11] A comparable situation was presented in *System Federation No. 91* v. *Reed*, 180 F. 2d 991, 996, where the court concluded that the facts made the action a true class suit although only a spurious class suit had been alleged. The court said with respect to this allegation: "This would indicate a claim based upon a right of a several character; but that was not the substance of the complaint, and it is the substance which controls."

properties in trust for the plaintiff and such other shareholders, and that the defendants be ordered and decreed to pay to the plaintiff and such other shareholders, as their interests may appear, all sums to which in justice and equity they may be entitled, * * *." (R. 19.)

Upon appeal the court below, after determining that Black had defrauded respondents, held "the former stockholders entitled to participate in the fund which equity has created by raising a trust and constituting Black as trustee therefor *ex malificio.*" (R. 455.) The court said:

"In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945." (R. 451.)

* * * * * *

"Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it." (R. 452.)

The court specifically recognized that in the determination and distribution of Black's unlawful profits, it was necessary to make a proper allocation of the proceeds of the 1947 sale among the equitable stockholders of Black-Marshall. For this allocation it prescribed the following formula:

"To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence the following formula: First, inquiry must be

made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amount paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

"Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transaction and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (R. 460.)

Petitioners declared in their reply brief on certiorari, as we have already noted (*supra*, p. 21), that this formula merely involves an arithmetical computation; that it results in the same fixed, absolute amount to each claimant regardless of the number of claimants or the disposition of their claims. It follows, say petitioners, that each respondent's claim is wholly independent of the claim of any other, the only connection between the claims lying in the existence of common question of law and fact.

The error in petitioners' argument is that its premise is simply untrue as a matter of fact. *The amount to which each claimant is entitled under the court's formula in fact depends directly and necessarily upon the disposition of the other claims presented.* This fact may readily be demonstrated.

Petitioners seem to assume that the application of the

Court of Appeals' formula simply requires that a fixed total sales price be divided by a fixed number of shares to arrive at a dollar per share figure, which may then be applied to determine the allocable portion of each claimant. This is not correct. The total number of shares *nominally* outstanding in 1947 is a fixed quantity. But the number of shares which were *equitably* outstanding and entitled to participate in the proceeds of the 1947 sale is a variable figure depending upon the disposition of individual claims.

This is because of the fact that after acquiring a large number of shares from respondents and others in 1944 and 1945, Black retired a substantial portion of the outstanding stock of Black-Marshall. As a result, the number of shares nominally outstanding at the time of Black's sale to N.C.R.A. in 1947 was substantially less than the number of shares that had been outstanding at the time of the fraud upon respondent in 1944 and 1945. Included among the retired shares were shares of which various persons claimed to have been defrauded. In order to determine how many shares were *equitably* outstanding in 1947 and therefore entitled to participate in the proceeds of Black's sale, it was necessary to determine the number of those shares which were fraudulently acquired and arbitrarily retired and were therefore entitled to be reinstated. For this reason, it was impossible to dispose fully or equitably of any one claim without also disposing of the others.

Respondents' claims against the fund which came into Black's hands in payment of the shares equitably owned by them are interrelated in another respect. This arises from the fact that, prior to purchasing respondents' shares, Black fraudulently issued 32,457.50 shares of Black-Marshall stock to himself. The court held this to be "a promoter's illegal, secret profit" (R. 454) and stated that it is "clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently to Black." (R. 458.) Since the court below concluded that

these fraudulently issued shares were not entitled to participate in the proceeds of the sale to N.C.R.A., it directed that the 32,457.50 shares be subtracted from the number otherwise found to be equitably outstanding in 1947 and thus entitled to participate in the distribution of the trust fund.

The Court of Appeals pointed out that when equity has raised a trust, the beneficiaries of the trust fund have a right to contest the claim of any one else to participate in the distribution of the fund. Here, therefore, the persons who were equitable stockholders of Black-Marshall at the time of the sale to N.C.R.A. had a right to demand that the 32,457.50 shares of stock fraudulently issued to Black should not be permitted to participate in the proceeds of the sale. That right was common to all such stockholders, and the relief granted—exclusion of the fraudulently issued shares from participation in the proceeds — was of common benefit to all. (See opinion of Court of Appeals, R. 455.)

The Court of Appeals' formula was carefully designed to give effect to the fact that the amount which each claimant is entitled to recover under the court's decision depends not only on the disposition of his own claim, but also on the disposition of those of the other claimants. The value per share of each claimant's right cannot be determined until, by disposition of all claims, the court ascertains how many shares must be reinstated because "arbitrarily retired by Black" after their fraudulent acquisition, and the total is then reduced by the 32,000 shares fictitiously issued to Black.

The interdependence of claims in this case is graphically illustrated by the chart opposite showing the variation in per-share allocation of the proceeds of the 1947 sale depending upon allowance or disallowance of various individual claims.

INTERDEPENDENCE OF THE CLAIMS INVOLVED HEREIN AS ILLUSTRATED BY THE EFFECT UNDER THE COURT OF APPEALS FORMULA OF VARIATIONS IN THE DISPOSITION OF INDIVIDUAL CLAIMS.[1]

	1	2	3	4	5
	Distribution Made in 1947	Equitable Distribution			
		If Claims of All Parties in District Court Had Been Upheld	As Claims Disposed of by the Court of Appeals	If Amen, Baldwin, E. Hall and Constants Claims Had Not Been Upheld	If Claim of Amen Alone Had Been Upheld
I. Total proceeds subject to distribution	$4,420.634.38	$4,420,634.38	$4,420,634.38	$4,420,634.38	$4,420,634.38
II. Nominally outstanding shares which participated in 1947 distribution	86,577.75				
III. Total valid shares entitled to participate in distribution					
Valid nominally outstanding shares[2]		54,119.75	54,119.75	54,119.75	54,119.75
Arbitrarily retired shares required to be reinstated		33,606.00	31,311.00	27,576.00	80.00
Total shares entitled to participate in distribution		90,855.75	85,430.75	81,695.75	54,199.75
IV. Distributive amount/share	$51.06	$48.66	$51.75	$54.11	$81.56

[1] The adjustments required by the Court of Appeals formula to reflect the payments made to defrauded shareholders in 1944 and 1945 are not included in these computations.

[2] Shares nominally outstanding in 1947 (86,577.25) less shares fictitiously issued to Black (32,457.50).

As this chart shows, petitioners' quarrel here is not with Professor Moore, but with the plain arithmetic of the Court of Appeals' formula.

The distribution of the purchase price to the shares nominally outstanding in 1947 amounted to $51.06 per share, as shown in the first column. But it is equitably necessary to reduce the nominally outstanding shares by the 32,000 shares secretly issued to Black and, on the other hand, to increase the shares nominally outstanding by reinstating the shares fraudulently obtained and then retired. If only Amen had established the basis for recovery, the resulting distributive amount per share would have been $81.56, as shown in line IV, column 5. Taking the other extreme, if the claims of all parties in the District Court had been upheld, the per share amount would have been $48.66, shown in line IV, column 2. Other variations are indicated in columns 3 and 4. This, we submit, is a factual demonstration that the claims here are not separate and distinct but interdependent and, therefore, that the record does not present the question which this Court granted certiorari to decide.

The claims are interrelated in still another respect. Since respondents must look to the trust fund consisting of Black's unjust enrichment for payment of their claims, and since Black's friends who continued to hold stock in Black-Marshall until 1947 received a part of the benefit from Black's unlawful retirement of respondents' stock, it is apparent that, apart from interest, the fund will be insufficient to pay respondents the full value of their stock as determined by application of the formula. Respondents' claims will therefore require pro-rata adjustment, which constitutes another element of interdependence between the claims here involved.

Accordingly, the factual situation now before the Court is this: Federal jurisdiction of the action as originally

brought is admitted. Dr. Amen's action sought to recover, on behalf of all members of the class of defrauded stockholders, their allocable shares of Black's unjust enrichment from the subseqnent sale to N. C. R. A. The Court of Appeals held Black to be a trustee *ex maleficio* with respect to his unlawful profits and directed the district court to distribute the trust fund on the basis of a prescribed formula. That formula took into account the fact that the number of shares equitably outstanding in 19[illegible] and therefore entitled to participate in the proceeds of the sale, depends upon the determination of the claims of all former stockholders whose shares were acquired by Black and then retired or sold to N. C. R. A. It also took into account the fraudulent issuance by Black of over 32,000 shares to himself. In short, this case presents a classic example of such interrelation among claims to a common fund that the equitable and final disposition of any claim depends on the disposition of all others.

B. This Case Is Indistinguishable in Principle from Dickinson v. Burnham, Which Petitioners Concede to Be Correct.

Since on its facts this is not an action involving separate and distinct claims related solely by the presence of common questions of law and fact, the jurisdictional contention on which petitioners rely and which this Court has granted certiorari to consider, whatever may be its merit, has no application whatsoever to this case.

Moreover, when petitioners' jurisdictional argument is applied to the actual facts of this case, it affirmatively demonstrates the correctness of the action of the courts below in permitting intervention herein without regard to citizenship. We shall show in a succeeding section of this brief that on its actual facts, as opposed to those errone-

ously assumed by petitioners, this case clearly comes within the prior decisions of this Court conceded by petitioners to have upheld intervention in actions based on diversity without regard to the citizenship of each intervenor. Before doing so, however, it is appropriate to consider a recent decision of the Court of Appeals for the Second Circuit, both because it is indistinguishable from this case on its facts and because petitioners have expressly conceded its correctness under the prior decisions of this Court. That case is *Dickinson* v. *Burnham*, 197 F. 2d 973.

The *Dickinson* case involved a claim advanced by two interveners in a pending action, both of whom established requisite diversity of citizenship. They sued on behalf of a class consisting of a group of persons who had contributed $600,000 to the so-called "Rinke Agency," which had been formed to attempt to overcome the financial difficulties of a corporation of which the subscribers were all stockholders. The action was brought to recover secret profits fraudulently received by the original plaintiff, Dickinson, as a result of buying corporate property at a foreclosure sale and then reselling it to the Rinke Agency at double the amount paid by him. The interveners sought, on behalf of the class, to recover from Dickinson the proceeds of the fraud, which should then be divided among the contributors to the Rinke Agency in proportion to their contributions.

After trial, the district court upheld the right of the members of the class to recover the proceeds of the fraud, amounting to $176,245.24 plus interest, but postponed entry of a final decree to permit other members of the class to intervene and establish their individual claims. The known members of the class were notified, and those who applied were allowed to intervene without regard to their citizenship and to prove their claims. The court then entered a final decree dividing Dickinson's unjust enrichment from

the fraud among the claimants in proportion to their respective contributions to the Rinke Agency.

Upon appeal it was contended that the district court had erred in allowing the intervention of the members of the class without regard to citizenship. But the Court of Appeals, speaking through Judge Clark, pointed out that the proceeds of the fraud in the hands of Dickinson[12] constituted a constructive trust fund which required proportionate distribution among the members of the class on the basis of their respective interests in the Rinke Agency. The Court said:

> "* * * By taking charge of the fund as it did, [the district court] afforded all necessary protection to the plaintiff while making a fair distribution to the actual parties in interest. And the result seems not merely practical, but legally sound.
>
> "For what we have here is property held in constructive trust by reason of fraud perpetrated upon those who made the original contributions. * * *" (197 F. 2d at 980.)

The Court therefore concluded with respect to the question of jurisdiction over the intervening claimants:

> "* * * The court found the diverse citizenship of the original parties and the interveners Burnham and Vaughn. This is sufficient for our purposes. *Townsend* v. *Bucyrus-Erie Co.*, 10 Cir., 144 F. 2d 106, 108. And it gave jurisdiction for adjudication of the issues between the class and the plaintiff and his co-conspirator, irrespective of citizenship of the subsequent interveners; the later distribution of the fund was merely an ancillary step in administration. * * *" (*Ibid.*)

The parallel between the facts of that case and this is apparent and striking. The class in the *Dickinson* case

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[12] Dickinson, the plaintiff in the original action, was one of the two persons found to have defrauded the Rinke Agency subscribers in the class action brought by the interveners.

consisted of persons who had contributed money to the Rinke Agency; here, it consists of persons who were stockholders in Black-Marshall. In both cases, the courts impressed a trust upon the proceeds of fraud in the hands of the fraudfeasor. In both cases the claims are interdependent, since the amount each claimant is entitled to recover from the fund depends upon the number of claimants whose claims are allowed by the court. And in both cases, the proportionate share of each claimant in the total recovery is based upon his proportionate financial interest in the enterprise (*i. e.*, the Rinke Agency in the one case, and Black-Marshall in the other). It is difficult to imagine two cases in a field necessarily involving complicated fact situations that are more nearly alike in all circumstances relevant to the question before the Court.[13]

Petitioners' treatment of the *Dickinson* case provides an interesting insight into their approach to this case. In their reply brief on certiorari (they do not now discuss the case in their brief on the merits), petitioners conceded that *Dickinson* was correctly decided in view of the "interdependent nature of the claims." (Reply Brief on certiorari, p. 5.) But in this case, petitioners said, the claims are not interdependent and involve nothing more than common questions of law and fact. As has been noted, they supported that representation with the assertion—without reference to the record—that the formula for recovery adopted by the court below is "a formula resulting in the same fixed,

[13] The fact that intervention of the non-diverse claimants in the *Dickinson* case occurred after judgment rather than prior to judgment, as in this case, is of course immaterial, as petitioners have recognized (Pet. Br. 22). This Court held in *Stewart* v. *Dunham*, 115 U. S. 61, 64, that: "* * * it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter cause had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

absolute amount to each claimant regardless of the number of claimants." (*Ibid.*)

We have already shown that this representation, which was vital to petitioners' attempted distinction of the *Dickinson* case, is simply untrue as a matter of fact. The claims here involved *are* interdependent. The amount which each claimant will receive cannot be fixed independently but depends upon the disposition of the claims of others who allege themselves to be equitable stockholders of Black-Marshall as of the date of the sale to N. C. R. A. in 1947. In short, petitioners attempted to distinguish the *Dickinson* case on a factual basis that is flatly disproved by the record.

Petitioners also attempted to distinguish *Dickinson* on other grounds that are patently and demonstrably untenable. They stated, for example, that the court had held in that case that non-intervening members of the class "would be bound by the judgment and so need not prove diversity of citizenship in order to come in to preserve their rights." (Reply Brief on certiorari, p. 4.) In fact, the court specifically *declined* to rule on that question, stating:

> "But we need not attack that interesting problem here. Our question is not the effect as *res judicata* of the judgment entered, but how far Dickinson can object to a transfer of the entire fund from his hands." (197 F. 2d at 979.)

Moreover, this "distinction" merely states a legal conclusion which, in view of the obvious factual similarity between the two cases, would be equally applicable here.

Petitioners next stated, without attempting to explain its significance, that the interveners in the *Dickinson* case sued not as stockholders, but as subscribers to the Rinke Agency Fund. (Reply Brief on certiorari, p. 4.) The un-

stated inference petitioners apparently ask the Court to draw is that the *Dickinson* case involved the restoration of a trust fund already within the jurisdiction of the court. But again, the facts are to the contrary. As the district court in the *Dickinson* case stated:

> "The claims pleaded by the original claimant-interveners against Dickinson sounded in fraud. Although all the interveners herein were the *cestuis* of a trust (the Rinke Agency Fund) the action is not, strictly speaking, one to restore a trust fund. The delinquent trustee is not a party to the action and the trust, as such, terminated, for all practical purposes, before the claims herein were filed." (11 Fed. Rules Serv. 489, 492.)

The Court of Appeals also emphasized the fact that the trust fund to be distributed was not the Rinke Agency Fund but the proceeds of the fraud perpetrated by Dickinson, which were held to constitute a trust fund in his hands. Here, on identical principles and using very similar language, the court below, citing the *Dickinson* case (R. 442), held the proceeds of Black's fraud to be a trust fund to be distributed to those equitably entitled thereto. The fact that in one case the members of the class were persons who had at one time contributed to a business trust and in the other case were persons who had been stockholders in a dissolved corporation is wholly immaterial.

Finally, petitioners stated categorically that the claimants in this case are somehow to be paid "in full" on an "ordinary tort liability for defrauding," whereas in the *Dickinson* case the claimants received something less than "full recovery". (Reply brief on certiorari, p. 5). This simply is not the case. In both instances the claimants sued for exactly the same thing—their proportionate shares in the proceeds of the fraud committed upon them. In neither case, contrary to petitioners' argument, was re-

covery sought on an ordinary tort damage theory. As the Court of Appeals expressly stated in this case:

> "In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less, of course the amounts heretofore paid on the sale price in 1944 and 1945." (R. 451.)
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> • • • • • •
>
> "*Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages.*" (R. 452.)

Black's unjust enrichment, on which the Court of Appeals imposed a constructive trust, is in fact less than the total loss sustained by respondents, and, therefore, the *pro rata* recovery of each will be less than the amount of his loss. The reason for this is that the arbitrary retirement of respondents' shares operated to increase the per share distribution received by some of Black's friends, who had retained a substantial number of shares, upon the sale of the company to N. C. R. A. in 1947. Black's fraud was responsible for this windfall to these persons, but the increase in the amount they received for their shares did not accrue to Black, and it is not reflected in his unjust enrichment, which constitutes the fund to be distributed under the opinion of the Court of Appeals.

Despite the most tortuous twistings and turnings, petitioners cannot escape the precise analogy of the *Dickinson* case. That decision is the more significant because the conflict of decisions relied upon in their petition for certiorari here was with an earlier Second Circuit decision, *Steele* v. *Guaranty Trust Co. of New York*, 164 F. 2d 387, which in fact involved separate claims presenting solely common questions of law and fact. It is thus evident that that court recognizes and differentiates between cases involving interdependent claims to a common trust fund and

cases involving nothing more than common questions of law or fact. That this case is of the former kind has been shown.

C. The Writ Should Be Dismissed as Improvidently Granted.

The question upon which this Court granted certiorari was whether a number of persons "asserting separate and distinct demands as to which there were some common questions of law and fact" may intervene in a federal court proceeding regardless of the citizenship of each intervener.

We have demonstrated, however, that those are not the actual circumstances of this case but that, on the contrary, this case involves highly interdependent claims to a fund held by Black as a trustee *ex malificio*. Petitioners' jurisdictional contention does not even purportedly apply to the actual facts. Indeed, they have expressly conceded the propriety of allowing interventions without regard to citizenship in circumstances indistinguishable from those actually involved in this case.

Under similar circumstances this Court has dismissed the writ as improvidently granted. In *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, for example, it was alleged in the petition that a lower court decree would deprive petitioner of his property without due process of law. After argument this Court dismissed the writ, stating:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto." (263 U. S. at 509.)

It is respectfully suggested that similar considerations should lead to dismissal of the writ in this case.

II.

THE EXERCISE OF ANCILLARY JURISDICTION OVER INTERDEPENDENT CLAIMS IS AN HISTORICAL FUNCTION OF COURTS OF EQUITY.

A. This Court and the Federal Courts Generally Have Long Permitted Intervention Without Regard to Diversity in Cases of This Kind.

Referring to *Strawbridge* v. *Curtiss*, 3 Cranch 267, for the rule that "in diversity cases involving multiple parties complete diversity of citizenship must exist between all parties, with each individually meeting federal jurisdictional requirements," petitioners assert that the court below has "swept aside the established law of a century and a half." (Pet. Br. 10-11, 14-15.) Standing alone this striking statement seems to imply that never before in 150 years have non-diverse parties been permitted to intervene in an action which has been brought into a federal court on the basis of diversity. Petitioners' argument as a whole discloses that all they really mean to say is that never in 150 years have non-diverse parties been permitted to come into diversity actions merely because their claims and the claims already before the court have some questions of law or fact in common. Later in their brief they acknowledge the existence of the long line of decisions, of which the *Dickinson* case is a recent example, holding that federal courts may in proper circumstances allow ancillary interventions, without regard to citizenship, in cases properly before them on the basis of diversity among the original parties. It is appropriate briefly to review some of those decisions to emphasize the fact that the allowance of intervention in this case is supported by a consistent practice extending back through the entire history of the federal court system. It is this body of law which has forced petitioners to stake their fur-

ther resistance to the judgment below on the hypothesis that the claims in this action involve only common questions of law and fact (Pet. Br. 23, 24).

One line of cases which illustrate the principle are the decisions involving creditors bills or analogous claims. Such actions were typically brought by one or more creditors of a particular debtor on behalf of all such creditors against the fraudulent transferee of the property of their debtor or against third persons as to whom their debtor owned choses in action. Diversity of citizenship between the original plaintiff creditors and the defendant transferees or debtors was essential to federal jurisdiction. But once the action had been instituted, other creditors were permitted to intervene without regard to diversity of citizenship on the ground that their participation was necessary for a proper distribution of the amount recovered and therefore ancillary to the adjudication of the original action. As this Court said in the leading case of *Stewart* v. *Dunham*, 115 U. S. 61, 64:

> "The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill."[14]

Similar principles were followed in *Handley* v. *Stutz*, 137 U. S. 366, which involved the question of jurisdictional amount. There, three creditors of a corporation brought

[14] The principle that a dependent or ancillary proceeding could be brought in a federal court having jurisdiction of the original cause irrespective of diversity of citizenship was early established. *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276.

a diversity action on behalf of all creditors against a number of its stockholders alleging that the corporation was insolvent and that the defendants owed unpaid subscriptions on their stock. Plaintiffs sought to have the unpaid subscriptions owed by the defendants declared a trust fund to be distributed among the creditors. While the original plaintiffs each claimed in excess of the required jurisdictional amount, the claims of many of the creditors who came in later were for less than that amount. But this court sustained the jurisdiction of the circuit court as to all such claims, stating:

> "The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2000, the Circuit Court had jurisdiction of the case, and authority to administer and distribute the amounts, due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master." (137 U. S. at 369.)

Again, in *Trustees of the Wabash and Erie Canal Co. v. Beers,* 2 Black 448, a lien creditor of a canal project brought suit on behalf of all holders of the first series of its bonds seeking the application of the property of the canal to payment of the bonds, which were in default. This court held that the action was proper as to parties, stating:

> "The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bond-holders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bond-holders are, about which we presume there will be little difficulty, and to notify them to

> come in and share in the fruits of the decree, on paying their proportion of its expense." (2 Black at 457-8.)

See also, *e. g., Richmond* v. *Irons,* 121 U. S. 27, 51-55; *French* v. *Gapen,* 105 U. S. 509, 525-526; *Morgan's L. & T. R. Co.* v. *Texas Central Ry. Co.,* 137 U. S. 171, 200-202; *Myers* v. *Fenn,* 5 Wall. 205, 207; *Phelps* v. *Oaks,* 117 U. S. 236, 240-241.

The reason for the exercise of such ancillary jurisdiction is clear. When the court has subject to its control and disposition a sum of money or property as to which there are a number of claimants, full equity and complete justice cannot be done unless all persons who have claims against the fund are permitted to assert those claims and to receive their proper distributive shares of the amount subject to disposition by the court.[15]

This court and the federal courts generally have applied this principle in a variety of situations. In *Leary* v. *United States,* 224 U. S. 567, for example, this court, speaking through Mr. Justice Holmes, held that in an action to charge the defendant with a trust in respect of funds obtained by him through fraud, a third person claiming an interest in the funds was entitled to intervene in the proceedings as of right. Again, in *Barnes* v. *Alexander,* 232 U. S. 117, 122, this Court upheld the right of one having an "inchoate" right to a fund to intervene in an action to establish the fund.

The principle enunciated in *Stewart* v. *Dunham, supra,* was made the basis for decision in a leading case involving class suits. *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356. There, a class action had been brought by certain

[15] As Professor Chafee once put it: "The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." Chafee, *Some Problems of Equity* (1950), p. 169.

Class A certificate holders of the defendant society on behalf of all such holders attacking a plan of reoganization of the society and seeking to enjoin the allegedly unlawful use of its funds. This Court held that, federal jurisdiction having been established by the original plaintiffs, the subsequent intervention of non-diverse members of the class as co-complainants would not have defeated jurisdiction, stating:

> "'* * * The parties and the subject-matter are within the court's jurisdiction. * * * The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.'" (255 U. S. at 367.)

The ancillary jurisdiction of the federal courts to consider and dispose of claims to funds subject to the court's control has frequently been applied in the lower federal courts as well. In *Peckham* v. *Ronrico Corp.*, 211 F. 2d 727 and *Peckham* v. *Family Loan Co.*, 212 F. 2d 100, for example, the Courts of Appeals for the First and Fifth Circuits respectively recently upheld the right of the representative of the creditors of two debtors to intervene in actions to recover assets of the debtors fraudulently concealed from such creditors in the hands of the defendant corporations. In the latter case the court said:

> "Both proceedings look to the ultimate liquidation and distribution of the properties or their proceeds between the creditors of both institutions, and contemplate their being drawn ultimately into the possession and control of the court below. * * * If it should turn out, as a result of such a trial, that the operations of Sol Meyer and Ferd Meyer [the debtors] were as fraudulent as claimed by complainant and the

intervenor, then the court may be called upon to exercise its equity powers in attempting to unravel and repair the wrongs thus charged." (212 F. 2d at 106-7.)[16]

Petitioners' position with respect to this body of law again emphasizes the fact that the parties are not in substantial disagreement as to the law but only as to the interdependent nature of the claims here presented. Petitioners recognize, for example, that under *Stewart* v. *Dunham, supra*, "all members of the class having claims, regardless of their citizenship, are entitled to the benefit of the decree adjudicating rights in the fund or other property under the court's control." (Pet. Br. 22.) But they reiterate that this is not a case of that kind but rather is one presenting only "separate and distinct claims related solely in the sense that there is a common question of law or fact involved and common relief is sought." (Pet. Br. 23-24.) As we have shown, the claims in this case are not of that character, but, on the contrary, require ancillary administration for precisely the same reasons as in the *Stewart* and *Dickinson* cases.

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, to which petitioners make repeated reference, is of no aid to them for the reason just stated. It involved an attempt by the original parties to an action to aggregate their claims for the purpose of satisfying the jurisdictional amount requirement even though such claims were wholly separate and distinct, each independent of the other. Most significant is the fact that this Court specifically recognized and distinguished a situation of the kind here presented. The then Mr. Justice Stone carefully pointed out (at p. 590, note 2):

"A different question is involved in the case of a

[16] Under related principles this Court held that no independent federal jurisdiction need be shown to support a compulsory counterclaim. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593. See also *Walmac Company* v. *Isaacs*, 220 F. 2d 108 (1st Cir.).

> creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount. *Lyon Bonding Co.* v. *Karatz*, 262 U. S. 77. But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court. *Gibson* v. *Shufeldt*, 122 U. S. 27; *Handley* v. *Stutz*, 137 U. S. 366; *National Bank of Commerce* v. *Allen*, 90 F. 545, 555-556."

Clark v. *Paul Gray* may aid petitioners in their controversy with Professor Moore, but it has no possible application here.[17]

Petitioners faintly suggest (Pet. Br. 24-25) that, whereas *Stewart* v. *Dunham* involved a fund within the court's jurisdiction, the instant case does not, and they quote Mr. Justice McReynolds' statement that:

> "• • • no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton National Bank* v. *Hozier*, 267 U. S. 276, 280.

Since petitioners drop the matter at that point, it is difficult to understand the basis for the distinction they purport to draw. Here, the court below, in accordance with respondents' prayers, impressed a trust upon the unlawful profits of Black's fraud and constituted him a trustee *ex maleficio*. There is thus a distinct fund subject to the jurisdiction of the court, which must be dis-

[17] *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F. 2d 687 (2nd Cir.), which petitioners cited in their reply brief on certiorari but not in their brief on the merits, does not aid them, as petitioners now apparently recognize. That case involved what the court referred to as "plainly a series of separate and distinct claims," which were not "transmuted into a 'single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone." (217 F. 2d at 695.)

tributed to the claimants in accordance with a prescribed formula.

We doubt that petitioners are contending that ancillary jurisdiction is appropriate only if the fund is locked in the registry of the court or is in the custody of a marshal or otherwise physically within the custody of the court. In the *Dickinson* case, as here, the fund was a constructive trust raised by the court in the property of the fraudfeasor as trustee *ex maleficio*. In the *Stewart* case, the fund was the proceeds of a fraudulent transfer in the hands of the transferee. In *Handley* v. *Stutz, supra*, the fund was in the hands of the stockholders of the insolvent corporation. In *Trustees* v. *Beers, supra*, the fund was in the hands of the transferees of the canal property. The list of similar decisions could be extended at great length.

It has never been true that this jurisdiction over a fund depends upon having the physical custody of property lodged in the court or its officers. On the contrary, if the processes of a court have been properly invoked to bring within the court's jurisdiction the persons having the property or assets in question, the court's control of the fund is complete. *Farmer's Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *United States* v. *Bank of New York Co.*, 296 U. S. 463, 477.

Here, as in the cases cited above (*supra*, pp. 38-41), the court has for disposition a specific sum as to which there are a number of claimants. That fund, Black's illegal profits from his sale to N. C. R. A., is now in Black's hands as trustee *ex maleficio*, and he is subject to the orders and directions of the court quite as much as if he had been appointed receiver. Since petitioners accept *Stewart* v. *Dunham* and *Dickinson* v. *Burnham* as correct applica-

tions of the principles just discussed, they cannot logically argue, we submit, that ancillary jurisdiction is improper in this case.

B. The Federal Rules of Civil Procedure Do Not Determine Jurisdictional Questions.

Throughout their brief, petitioners accuse Professor Moore of attempting to extend federal jurisdiction through the medium of Rule 23 of the Federal Rules of Civil Procedure. They point out, quite correctly, that the Rules themselves are merely procedural and thus do not have independent jurisdictional significance. Rule 82 specifically so provides.

Yet, despite their acceptance of this basic premise, petitioners treat the jurisdictional question here presented as if it depended entirely upon whether this case falls within the first, second or third subdivision of Rule 23(a). They thus fall into the very error of which they accuse Professor Moore; that is, they attempt to resolve the jurisdictional question solely by reference to the Rules, without reference to the underlying principles upon which federal jurisdiction depends.[18]

We submit that this approach puts the cart before the horse. The basic question here is whether, under long and well established principles of federal jurisprudence, federal jurisdictional requirements have been satisfied. Whether the action comes within subparagraphs (1), (2) or (3) of

[18] This error is pointed up by the fact that petitioners also argue the *res judicata* effect of judgments in class suits as though that matter depends exclusively upon whether the case falls within Rule 23(a) (1), (2) or (3). (See Pet. Br. 22-23.) But, while Professor Moore made just such a proposal in his tentative draft of Rule 23, the Advisory Committee rejected his attempt thus to give Rule 23 substantive significance. Now petitioners themselves attempt to decide substantive questions solely by reference to the Rule.

Rule 23(a) cannot be decisive of this question. The difficulties that the courts have encountered in determining whether a class action is "true," "hybrid" or "spurious" lend emphasis to this point. The Court of Appeals for the Sixth Circuit has noted, for example that:

> "'The task of pigeonholing operative facts into one of the three categories as of 'true,' 'hybrid,' or 'spurious' suit has baffled both courts and commentators." *System Federation No. 91* v. *Reed*, 180 F. 2d 991, 996.

And Professor Chafee once remarked:

> "The undesirability of this tripartite classification has been pretty well demonstrated by the difficulties which courts have had about putting a class suit into one of the three pigeonholes. It is not uncommon, when a case goes through several courts, for one court to call it spurious and another hybrid, and sometimes the judges throw up their hands in despair, and frankly say they do not know what it is."[19]

Whether or not one agrees with the proposal that the tripartite classification should be abolished, the difficulty of its application points up the fact that the sub-classifications of Rule 23(a) are not themselves jurisdictional statutes. This was very aptly put by Judge Clark in the *Dickinson* case. There, the district court had held the action to be a "spurious" class suit. But Judge Clark remarked:

> "By making use of this euphonious, if mystic, label, the judge has let himself in for a considerable amount of trouble. For the procedural aspects of this appeal are made to turn largely upon arguments and deductions drawn from this observation.
>
> "The convenient use of the appellations 'true,' 'hybrid,' and 'spurious' for determining the effect of a judgment in a class suit under F. R. 23(a) has be-

[19] Chafee, *Some Problems of Equity* (1950), p. 249.

> come rather general; but these labels should not be pressed so far as to obscure the original meaning and purpose of the rule itself." (197 F. 2d at 978-9.)

The court then concluded, upon analysis, that:

> "* * * we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably." (197 F. 2d at 979.)

Since the circumstances of this case are so nearly the same as those in *Dickinson*, this is squarely applicable precedent for concluding that this is also a Rule 23(a)(2) or "hybrid" class suit. That subdivision refers to actions in which the rights asserted are "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." As we have pointed out, the property here involved, a constructive trust fund, is of precisely the same nature as the fund involved in the *Dickinson* case, and there is an equal necessity for adjudicating the claims to participate in the fund.

This conclusion is also required by the decision of the Third Circuit in *Pennsylvania Co. For Insurances* v. *Deckert*, 123 F. 2d 979, 983, holding that when individual plaintiffs having individual causes of action "have also a right to a common fund or in common property, the class action may be 'hybrid.'" And see 3 Moore's *Federal Practice*, p. 3441.[20]

In sum, the decisions of this Court and the federal courts generally over many years past justify and require

[20] In this connection it should be noted that in *Knowles* v. *War Damage Corp.*, 171 F. 2d 15, 18 (D. C. Cir.), quoted by petitioners (Pet. Br. 17-18), Judge Prettyman described the claims involved in a "spurious" class suit as "several and *not interdependent*," thus recognizing that suits involving interdependent claims involve something more than merely common questions of law or fact.

the conclusion reached by the Second Circuit in the *Dickinson* case. Since this case is precisely analogous on its facts, there can be no real question but that intervention by other members of the class without regard to diversity of citizenship was perfectly permissible and proper. Petitioners' arguments to the contrary all ultimately founder on a single, vital, conclusive fact: The claims here involved are not "separate and distinct claims related solely in the sense that there is a common question of law or fact involved," as charged (Pet. Br. 24) but, on the contrary, are interdependent claims to a trust fund subject to the control and disposition of the court.

III.

THE JURISDICTION OF THE COURTS BELOW IS ALSO SUSTAINED BY THE ALLEGATION OF A FEDERAL STATUTORY CAUSE OF ACTION.

Respondents have dealt fully with petitioners' contention that the claims involved are separate and distinct and, therefore, that each intervener must prove citizenship diverse from that of petitioners, since that was the question upon which this Court granted certiorari. Quite apart from any question as to diversity of citizenship, however, the jurisdiction of the federal court in this case is established by the allegation in the complaint of a federal statutory cause of action.

In paragraph 3 of the amended complaint in the original federal action herein it is alleged:

> "The plaintiff avers that this action arises also under the Constitution and laws of the United States." (R. 13.)

In paragraph 8(f) it is alleged that:

> "In connection with the purchases of securities herein described, the defendant William H. Black and Dale

G. Ives [fol. 15] made use of the United States mails and of means and instrumentalities of interstate commerce,

"(1) to employ the devices, schemes and artifices to defraud,

"(2) to make the untrue statements of material facts and to omit to state the material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and

"(3) to engage in the acts, practices and course of business which operated as a fraud and deceit upon the plaintiffs, all as herein set forth." (R. 15; see also R. 45.)

These allegations are based upon, and substantially repeat, Rule X-10B-5 of the Securities and Exchange Commission, 17 CFR § 240.10b-5. This rule is, in turn, based upon Section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78j(b). It is well established that a private cause of action may be brought under Rule X-10B-5. *Fratt* v. *Robinson*, 203 F. 2d 627, 631 (9th Cir.); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (2nd Cir.) Respondents' complaint thus alleges both federal and common law causes of action, the facts as to Black's fraud in the acquisition of respondents' stock going equally to support both causes of action.

The decisions of the federal courts applying Rule X-10B-5 hold that that provision encompasses the same types of claims that have heretofore been brought under common law fraud theories. In *Fratt* v. *Robinson, supra*, for example, the court said:

"In a sense, of course, the instant action is based upon a statute, but it is also based upon fraud which has been the subject of common law concern through the centuries." (203 F. 2d at 635.)

Moreover, Rule X-10B-5 adopts the most liberal state rules relating to fraudulent acts involving securities. As Professor Loss stated:

> "Now there are superimposed on this common-law background the several anti-fraud provisions of the SEC statutes. It is obvious from the language that some of the basic problems are the same—what is false, what is a fact and what is material. Because of the legislative background it seems reasonable to assume at the very least that the most liberal common-law views on these questions should govern under the statutes."[21]

It is clear, therefore, that respondents pleaded a good cause of action arising under the laws of the United States. *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2 Cir. 1951); *Fratt* v. *Robinson*, 203 F. 2d 627 (9 Cir. 1953); *Errion* v. *Connell*, 236 F. 2d 447 (9 Cir. 1956); *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa. 1946); *Remar* v. *Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass. 1949); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 135 F. Supp. 176 (D. Del. 1955), aff'd 235 F. 2d 369 (3 Cir. 1956); *Loss, Securities Regulation* 1043-66 (1951, Supp. 1955).

A substantial federal cause of action having been alleged, there was pendent jurisdiction over the equivalent common law cause of action under state law. *Siler* v. *Louisville and N. R. R. Co.*, 213 U. S. 175; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593; *Hurn* v. *Oursler*, 289 U. S. 238; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315. The fact that only the common law cause of

[21] Loss, *Securities Regulation* (1951), pp. 816-17. The relation between the actions under Rule X-10B-5 and common law fraud theories is well illustrated by the leading case of *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 828, where both federal and state law claims based on the same facts were finally sustained, although the state law claim had once been dismissed.

action was ultimately relied upon in the Court of Appeals as the basis for recovery does not affect the jurisdiction:

> "The Federal questions * * * gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Siler* v. *Louisville & N. R. R. Co., supra* at page 191.

Assuming *arguendo,* therefore, that the jurisdictional question presented by petitioners is actually present in the case and that diversity jurisdiction was lacking over the Constants' claims, the Court of Appeals' judgment would be supported by the allegation of the equivalent claims arising under the laws of the United States.

IV.

PETITIONERS' SUBSIDIARY ARGUMENTS ATTEMPT TO RAISE ISSUES FORECLOSED BY THIS COURT'S ORDER ON CERTIORARI AND INTRODUCE PATENT IRRELEVANCIES.

A. The View That Diversity Jurisdiction Should Be Abolished Provides No Proper Basis for Judicial Action.

Petitioners invite this Court to reflect in its determination of the present issue an assumed conviction that diversity jurisdiction should be abolished (Pet. Br. 30-31) and, to that end, quote from a statement of Mr. Justice Frankfurter's well-known views on this subject. They even review at some length testimony in support of the most recent of the long series of unsuccessful efforts in Congress "to narrow diversity jurisdiction, or to eliminate it completely."

It would seem necessary, in order to complete the record, to have added that Mr. Justice Frankfurter has also insisted that his views as to the desirability of diversity jurisdiction provide no proper basis for judicial action in the face of a contrary legislative determination. In his dissent in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 336 *et seq.*, he stated:

> "* * * whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. See 13 Cornell L. Quart 499, 520 *et seq.* But I must decide this case as a judge and not as a legislative reformer.
>
> "Aside from the Johnson Act of May 14, 1934, 48 Stat. 775, c. 283, 28 USC § 41(1), the many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. Again and again legislation designed to make inroads upon diversity jurisdiction has been proposed to Congress, and on each occasion Congress has deliberately refused to act."

Moreover, there are no reasons of policy of which we are aware that could be cited to justify a constriction of judicial power in a manner that precludes the final and equitable disposition of the controversies properly brought in the federal courts. Even an opponent of diversity jurisdiction might be expected to agree that, if a court is required to exercise such jurisdiction at all, it should have the power properly to determine the controversies brought before it in accordance with long-accepted standards of adjudication. This was the very point made by Judge Clark, speaking for himself and Judges L. Hand and Swan in

Lesnick v. *Public Industrials Corporation,* 144 F. 2d 968, 973-4 (2nd Cir.):

> "But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. • • • Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counterclaims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation. Consequently the adding of parties under the rules has been viewed in the light of the ancient and well-established principle that a federal court has 'ancillary' jurisdiction to complete adjudication of interrelated matters where its jurisdiction has once been competently invoked" (144 F. 2d at 973-974).

The asserted undesirability of diversity jurisdiction generally is patently not a proper basis on which to modify the principle that in cases within the traditional ancillary jurisdiction of the court, persons asserting claims may intervene without regard to their citizenship.

B. In Arguing Claims of Substantive Error Petitioners Have Disregarded This Court's Limitation of Its Grant of Certiorari.

Pages 33-40 of petitioners' brief are devoted to the argument of substantive law questions which were embraced within the second question presented in their petition for certiorari and were excluded by this Court from its limited grant of certiorari, 352 U. S. 888. These questions are discussed, say petitioners, because they show that "failure to follow jurisdictional rules has been reflected in proced-

ural confusion and substantive error" (Pet. Br. 33-34). This, we submit, is the smallest nose for the largest camel that ever tried to force its way into the tent.

The examples of "substantive error" which petitioners choose to argue turn out to be two of the Court of Appeals' rulings of which petitioners complained in connection with the second question presented in their petition for certiorari. First, they again argue that in applying the Kansas statute of limitations, the Court of Appeals disregarded the evidence in the record on the question, "when did plaintiffs know the facts necessary to discover fraud, if any" (Pet. Br. 35). Second, petitioners claim that the Court of Appeals failed to attempt to determine whether Kansas or Illinois law applied to recovery for corporate wrongs, despite the fact that "while the Court said that the individual former stockholders could recover for the alleged wrong to the corporation, it is clear that the law of Illinois says they cannot" (Pet. Br. 38-39).

We see no point in rearguing these matters. Petitioners contended in their petition for certiorari that the court below was clearly wrong, citing cases, while respondents urged that the court was clearly right, citing cases. When this Court declined to review the state law questions, the matter was closed. For petitioners to reargue the same questions, which have now been conclusively resolved against them, as examples of the "clear error" resulting from disregard of jurisdictional rules not only seems of questionable logic but of doubtful propriety.

Moreover, all of petitioners' arguments as to the possibility that a federal court may not correctly apply state law would apply equally to any diversity case. Petitioners' examples of "substantive error" thus amount to another attack upon diversity jurisdiction *per se*, not upon the necessity for permitting the intervention of non-diverse parties in this case.

C. Petitioners' Suggestion That "Procedural Confusion" Requires a Broad Remand to the Trial Court Constitutes an Effort to Relitigate Substantive Questions Foreclosed by the Order of the Court.

At a number of points in their brief, petitioners have referred to "the failure from the beginning to view federal jurisdiction requirements [as being] of any importance" (Pet. Br. 8, 34, 40). They allege that this has resulted in "procedural confusion" (Pet. Br. 12, 33-34, 40) and that "the litigation is best described as a procedural muddle, which can only be clarified by a complete review of the proceedings below" (Pet. Br. 13, 40). This they describe as a "formidable task" which "could best be done by the trial court upon remand" (Pet. Br. 8, 40). On this basis they suggest a remand of the cause "for re-examination in light of the controlling jurisdictional rules" (Pet. Br. 42).

This Court should recognize petitioners' argument for what it is. Petitioners know that even if they should prevail on the jurisdictional question this Court agreed to review and the case were remanded with directions to dismiss the nondiverse interveners, they would have won a skirmish but lost the war. For they know with certainty that of all the claimants in this case Mr. and Mrs. Constant are the only persons whose citizenship is the same as petitioners'.

It seems clear that from the outset the issue raised as to the lower court's jurisdiction to permit the intervention of the Constants was simply the handmaiden of the effort to obtain a review of the substantive questions decided by the Court of Appeals. To this same end what petitioners seek now, in view of the Court's limited grant of certiorari, is an order that will permit them to contend in the trial court, upon remand, that some of the substantive questions that were resolved against them in the Court of Appeals may be reargued.

Petitioners have accordingly set out to convince the Court that the case should be remanded to the trial court with a broad mandate that would permit the reopening of issues that have already been decided. The vehicle they have selected is "procedural confusion." One would gather from petitioners' brief that the case was haphazardly tried by incompetent counsel on both sides and haphazardly decided by the courts below. Having set out to demonstrate confusion, petitioners not unnaturally profess to find confusion. But saying it, however often, does not make it so. We have undertaken to point out the reasons why the citizenship of the interveners is immaterial. But in any event there is no "confusion." It is quite true that the interveners did not formally allege their citizenship and did not testify that they were "citizens" of Illinois, Florida and Oregon. No attempt to make formal proof of citizenship was being made. It is a fair inference, however, that if a person testifies that he has lived in one small town in southern Illinois for 29 years (R. 137) or 50 years (R. 139) or "all my life" (R. 141), or is engaged in the practice of medicine in a town (R. 139, 140), it will not be any great problem formally to establish his citizenship.

The evidence clearly shows that two interveners, Mr. and Mrs. Constant, were residents of California, where petitioners now also reside.[22] If it was error to have permitted them to intervene, which respondents respectfully deny, they may simply be dismissed. *Conolly* v. *Taylor*, 2 Pet. 556; *Vattier* v. *Hinde*, 7 Pet. 252; *Horn* v. *Lockart*, 17 Wall. 570; *Camp* v. *Gress*, 250 U. S. 308, 317.

Respondents submit that the citizenship of the two nondiverse interveners is immaterial in view of the interdependent nature of all the claims and the existence of a

[22] Despite numerous references to "confusion" on the subject of citizenship, petitioners seem reluctantly to face the reality that actually it is only the Constants whose citizenship is nondiverse. (Pet. Br. 9, 13-14, 41.)

federal question. If this Court should disagree, however, and should sustain petitioners' contention that the claims involved are "separate and distinct," by the same token the dismissal of the Constants' claims should not deprive all other respondents of the fruits of the judgment below. If their testimony in this record does not itself suffice (R. 137-147) nothing would be required upon remand except formal proof of citizenship by respondents, and any order of remand should so provide.

Petitioners also profess to find "confusion" in the situation as regards Black-Marshall. They assert that the corporation is a necessary party, that it must be aligned as a defendant, and that this raises jurisdictional problems which must be resolved by the trial court (Pet. Br. 14, 40-41).[23] Petitioners do not ask this Court to review the correctness of these assertions, in uncharacteristic deference to this Court's limitation of its grant of certiorari; indeed, they note that to do so "is hardly possible on this record" (Pet. Br. 40).

These assertions, which petitioners ask this Court to accept as if they were self-evident, are incorrect in fact and law and, again, constitute an attempt to reopen substantive decisions of the Court of Appeals. That court held that respondents' right to have the 32,000 odd shares fraudulently issued to Black excluded from participation in the proceeds of the sale was *not* sustained as a corporate claim but was one inhering in the former stockholders as beneficiaries of the trust (R. 454-455).

In arguing that the trial court must be permitted to determine "whether Black-Marshall was and is a necessary party in any such recovery" (Pet. Br. 41), petitioners are

[23] It should be noted in passing that Black-Marshall was dissolved in 1947, two years before these actions were commenced; that it was dismissed as a named party; and that its receivers have been active plaintiffs in this litigation ever since the dissolution of the company was set aside.

simply asking that this Court permit the trial court to review and overrule the Court of Appeals with regard to the nature of the claim involved in the invalidation of the 32,000 shares. In the trial court, obviously, petitioners would make the same arguments that appear at pages 37-40 of their brief in this Court, which in turn repeat arguments made at pages 26-32 of their petition for certiorari in support of their second question presented—which this Court declined to review. In short, petitioners would like to parlay claimed "procedural confusion" into a complete retrial of this case, more than eight years after it was commenced and nearly five years after trial.

CONCLUSION.

The writ of certiorari should be dismissed as improvidently granted, or the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

The question argued by petitioners, but not presented by the facts of this case, turns on whether Rule 23(a) is in effect simply a restatement of former Equity Rule 38 and covers the same ground as the old rule, or whether subparagraph (3) of 23(a) goes beyond the scope of Rule 38.

In *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, this Court, after reviewing the history of class actions in the federal courts, said:

> "The subject is provided for by Rule 38 of the Equity Rules of this court promulgated in 1912, which reads: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.' As the rule formerly read it contained the following provision 'but in such cases the decree shall be without prejudice to the rights and claims of the absent parties.'
>
> "The District Court held that this change in the rule could not affect the jurisdictional authority of the court, * * *. (pp. 363, 364)
>
> * * * * *
>
> "The change in Rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. Street's Federal Equity Practice, vol. 1, § 549.
>
> * * * * *
>
> "Rule 38, as amended, was intended to apply to just such cases. * * * Of course, mere considerations of inconvenience cannot confer jurisdiction, but it is to

be noted that if the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to a part of the same class.

"If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." (pp. 366, 367)

This Court thus seems clearly to have held that in class actions within the scope of Equity Rule 38, namely actions in which "the question is one of common or general interest * * *," the court has ancillary jurisdiction to determine the claims of non-diverse interveners.

Federal Rule 23(a) seems to have been intended merely to cover the same types of cases that had been held to be proper class actions within Equity Rule 38. The Notes of the Advisory Committee on the Federal Rules state with respect to Rule 23:

"Note to subdivision (a). This is a substantial restatement of former Equity Rule 38 (representatives of class) as that rule has been construed." (28 U. S. C. A. following Rule 23.)

And in *System Federation* v. *Reed*, 180 F. 2d 991, 995 (6th Cir.), the court observed:

"* * * According to Dean Charles E. Clark, now Judge Clark of the United States Court of Appeals for the Second Circuit, formerly Reporter to the Committee, Rule 23 was an attempt at clarification of an ancient rule of equity, the limits of which had always been doubtful. Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland 1938, page 263. The federal rules have in no wise limited or restricted the right to bring class suits in proper cases, as was previously provided for by the former equity rule."

Petitioners now contend that to permit the intervention of non-diverse parties in class actions under subparagraph (3) of Rule 23(a) will "contravene the established jurisdictional limitations on the federal courts." (Pet. Br. 11.) The issue thus raised between petitioners and Professor Moore appears to be whether subparagraph (3) of Rule 23(a) permits the bringing of class actions not comprehended by Equity Rule 38. Petitioners must contend that this Court's Advisory Committee was mistaken in its conclusion that Rule 23(a) merely restates the substance of Equity Rule 38.

Stated differently, the question is whether, when the right sought to be enforced is "several, and there is a common question of law or fact affecting the several rights" within Rule 23(a)(3), the action necessarily involves questions "of common or general interest" within Equity Rule 38, or whether, on the other hand, Rule 23(a)(3) authorizes class actions not permissible under Equity Rule 38, contrary to the evident intent of the Advisory Committee. This is an interesting question, but it is not presented for decision by this case.